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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC., *et al.*,

Appellants,

v.

THE WASHINGTON PUBLIC POWER SUPPLY SYSTEM, *et al.*,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF WASHINGTON

JURISDICTIONAL STATEMENT

STEPHEN A. WEINER
DAVID G. KEYKO*
SUSAN J. KOHLMANN
WINTHROP, STIMSON, PUTNAM & ROBERTS
40 Wall Street
New York, New York 10005
(212) 943-0700

Attorneys for Appellants
American Express Companies

and

WALTER S. TABLER
SMITH, SMART, HANCOCK, TABLER & MIDDLEBROOKS
3800 Columbia Seafirst Center
701 Fifth Avenue
Seattle, Washington 98104
(206) 624-7272

Attorneys for Appellants
American Express Companies and United States Trust Company of New York, as Trustee

* *Counsel of Record*

May 18, 1988

QUESTIONS PRESENTED

1. Does Wash. Rev. Code § 21.20.430(7)(1987), which by design favors certain Washington parties over out-of-state parties, violate the Commerce Clause of the United States Constitution?

2. Does Wash. Rev. Code § 21.20.430(7)(1987), which singles out Washington municipal corporations and certain related parties for special treatment and which favors issuers and participants in the issuance of Washington securities over issuers and participants in the issuance of out-of-state securities, violate the Equal Protection Clause of the United States Constitution?

3. Does Wash. Rev. Code § 21.20.430(7)(1987), by removing causes of action in negligence from the Washington State Securities Act and thereby extinguishing pending actions against Washington municipal corporations, their agents and other parties, violate appellants' due process rights under the Fourteenth Amendment of the United States Constitution?

LIST OF PARTIES

The list of parties may be found at page 136a of the Appendix.

STATEMENT PURSUANT TO RULE 28.1

The Statement Pursuant to Rule 28.1 may be found at page 139a of the Appendix.

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Appellants,

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Appellees.

ON APPEAL FROM THE SUPREME COURT OF WASHINGTON

JURISDICTIONAL STATEMENT

The American Express Companies[1] and United States Trust Company of New York, as Trustee, (collectively, "Amexco/US") appeal from the final judgment of the Supreme Court of Washington, dated October 8, 1987, as amended on February 17, 1988, holding that: (i) Amexco/US has no standing to assert that Wash. Rev. Code § 21.20.430(7) (1987),[2] which by design favors certain Washington parties over out-of-state parties, violates the Commerce Clause of the United States Constitution; (ii) Wash. Rev. Code § 21.20.430(7), which singles out certain parties for special treatment, does not violate the Equal Protection Clause of the United States Constitution; (iii) Wash. Rev. Code § 21.20.430(7), which retroactively removed certain negligence

[1] The American Express Companies are comprised of American Express Travel Related Services Company, Inc., American Express International Banking Corporation, Firemen's Fund Insurance Company, The American Insurance Company and Associated Indemnity Corporation.

[2] Codifies Act approved April 4, 1986, ch. 304(7), 1986 Wash. Laws 1352, 1353-54 (which is referred to as "Wash. Rev. Code § 21.20.430(7)").

causes of action from the Washington State Securities Act ("WSSA")[3] in order to extinguish certain claims made in this litigation and related actions against Washington municipal corporations and certain related parties, does not violate the right to due process guaranteed by the Fourteenth Amendment to the United States Constitution; and (iv) Wash. Rev. Code § 21.20.430(7), which retroactively removed certain negligence causes of action and thereby removed certain of the bondholders' contract rights, did not constitute an impermissible impairment of contract.[4] Because the constitutionality of Wash. Rev. Code § 21.20.430(7) is drawn into question, 28 U.S.C. § 2403(b) (1988) may be applicable and Amexco/US has served the Attorney General of the State of Washington. This jurisdictional statement is submitted to show that the Supreme Court has jurisdiction over this appeal and that substantial questions are presented.

OPINIONS BELOW

The opinion of the Supreme Court of Washington is officially reported at *Haberman v. Washington Public Power Supply System*, 109 Wash. 2d 107, 744 P.2d 1032 (1987). Appendix ("App.") A at 1a. The opinion was modified by an Order Changing Opinion which is officially reported at *Haberman v. Washington Public Power Supply System*, __Wash. 2d__, 750 P.2d 254 (1988). App. B at 85a. By order dated February 19, 1988, the Washington Supreme Court denied further reconsideration. App. C at 86a. The Washington Superior Court, the trial court in this action, orally granted in part Appellees'[5] motion to dismiss on July 26, 1985. App. D at 87a. Subsequently, on October 7, 1985, the Superior Court denied Amexco/US's motion for reconsideration, as well as certain Appellees' motions for reconsideration, and granted the Ap-

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[3] Wash. Rev. Code § 21.20.010 *et seq.* (1987).

[4] The Haberman Group, which consists of those appellants other than Amexco/US who were plaintiffs below, is filing a jurisdictional statement on the issue of the constitutionality of the Scienter and Retroactivity Amendments under the Contract Clause of the Constitution. Amexco/US agrees with the Haberman Group and will not repeat those arguments in this statement.

[5] Defendants below and appellees in this appeal are referred to collectively as "WPPSS" or "Appellees".

pellees' request to dismiss the entire action. On the same day, the Superior Court issued its Order and Judgment of Dismissal, which is not officially reported, from which appeal was taken to the Supreme Court of Washington. App. E at 102a.

JURISDICTION

The Supreme Court of Washington rendered its decision on October 8, 1987, which became final by its Order Changing Opinion on February 17, 1988. Amexco/US filed a timely notice of appeal in both the Supreme Court and Superior Court of Washington on May 10, 1988. App. F at 114a. This appeal is being docketed within 90 days of the judgment below.

This Court has appellate jurisdiction under 28 U.S.C. § 1257(2) (1988). The issue on appeal here--the constitutionality of Wash. Rev. Code § 21.20.430(7)--is a federal issue which has been "finally decided by the highest court in the State" and which "will survive and require decision regardless of the outcome of future state court proceedings." *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 480 (1975); *see also American Export Lines, Inc. v. Alvez*, 446 U.S. 274, 279 n.7 (1980) (separate maritime loss of society claim deemed final notwithstanding non-finality of other claims yet to be tried). As a result of the Washington Supreme Court decision, Amexco/US's WSSA negligence cause of action against WPPSS will not be tried. The trial of WSSA claims in other related Washington Public Power Supply System bond cases will also be affected by the Washington Supreme Court's decision. *See, e.g., Hoffer v. Washington*, No. 53549-3, slip op. at 19 n.5 (Wash. May 12, 1988) (the State Auditor may not be held liable for mere negligence under the supreme court's decision in *Haberman*). Thus, the issue will require decision regardless of the outcome of the trial of Amexco/US's other causes of action. Moreover, immediate review is warranted and the finality requirement is satisfied because delay of review until after trial will leave the securities market in Washington operating under a "rule of law and a statute the constitutionality of which is in serious doubt." *Cox Broadcasting*, 420 U.S. at 485-86.

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Article 1, section 8, clause 3:

> The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

United States Constitution, Amendment XIV, Section 1:

> [N]or shall any state deprive any person of . . . property, without due process of law. . . .
>
> [N]or deny to any person within its jurisdiction the equal protection of the laws.

Wash. Rev. Code § 21.20.430(7):

> Notwithstanding subsections (1) through (6) of this section, if an initial offer or sale of securities that are exempt from registration under RCW 21.20.310 is made by this state or its agencies, political subdivisions, municipal or quasi-municipal corporations, or other instrumentality of one or more of the foregoing and is in violation of RCW 21.20.010(2), and any such issuer, member of the governing body, committee member, public officer, director, employee, or agent of such issuer acting on its behalf, or person in control of such issuer, member of the governing body, committee member, public officer, director, employee, or agent of such person acting on its behalf, materially aids in the offer or sale, such person is liable to the purchaser of the security only if the purchaser establishes scienter on the part of the defendant. The word "employee" or the word "agent," as such words are used in this subsection, do not include a bond counsel or an underwriter. Under no circumstances whatsoever shall this subsection be applied to require purchasers to establish scienter on the part of bond counsels or underwriters. The provisions of this subsection are retroactive and apply to any action commenced but not final before July 27, 1985. In addition, the provisions of this subsection apply to any action commenced on or after July 27, 1985.

STATEMENT OF THE CASE

Based upon the alleged negligent misrepresentations of WPPSS, Amexco/US purchased approximately $360 million of the $2.25 billion of Washington Public Power Supply System bonds sold to finance the construction of two nuclear power plants (the "WPPSS Bonds"). These bonds are now virtually worthless and this action was commenced to recover for the misrepresentations of WPPSS. The State of Washington has attempted, through the challenged legislation, to prevent Amexco/US and other bond purchasers, who are predominantly from outside the State of Washington, from recovering their losses from Washington and other Pacific Northwest utilities or certain of their agents.

In April of 1985, approximately nine years after Amexco/US purchased its first WPPSS Bonds and a year after this litigation was commenced, the State of Washington amended WSSA by adopting Wash. Rev. Code § 21.20.430(7) (1985) (amended 1986) (the "Scienter Amendment").[6] The legislation removed the WSSA negligence cause of action as to certain defendants and replaced it with a scienter cause of action. Notwithstanding the State of Washington's efforts, the Scienter Amendment failed to terminate all claims against Washington utilities and associated parties in this and related cases. The Scienter Amendment failed because it was held not to be retroactive by the United States District Court in *In re Washington Public Power Supply System Sec. Litig.*, MDL No. 551 (W.D. Wash.) ("*WPPSS Federal Action*"), a related federal class action. *Id.*, (Jan. 24, 1986) (order addressing motions to dismiss state law claims) at 11. Consequently, the Scienter Amendment was made expressly retroactive by passage of Act approved April 4, 1986, ch. 304(7), 1986 Wash. Laws 1352, 1353-54 (current version at Wash. Rev. Code § 21.20.430(7) (1987)) (the "Retroactivity Amendment"). The only litigation affected by this change is that relating to WPPSS Bonds.

The Scienter and Retroactivity Amendments, expressly designed to favor Washington residents over parties from outside the State, violate the Commerce Clause and the Equal

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[6] Codifies Act approved April 25, 1985, ch. 171(7), 1985 Wash. Laws 640, 642 (current version at Wash. Rev. Code § 21.20.430(7) (1987)).

Protection Clause of the Constitution. In addition, by summarily terminating certain pending negligence causes of action, the Retroactivity Amendment deprives Amexco/US of its due process rights guaranteed by the Fourteenth Amendment.

Statement Of Facts

In the 1960's, utilities located in the Pacific Northwest determined that five nuclear power plants should be constructed. Appellee Washington Public Power Supply System (the "Supply System"), a joint operating company comprised of nineteen public utility districts located in Washington and four Washington cities (the "Members" who are Appellees), was chosen as the vehicle to oversee the financing, construction and operation of the nuclear power projects.

In 1976, eighty-eight utilities located in Washington and neighboring states (the "Participants" who are Appellees), in order to facilitate the construction of the fourth and fifth of those nuclear generation projects ("Projects 4 and 5"), executed virtually identical Participants' Agreements with the Supply System. Twenty of the twenty-three Members were Participants and entered into these Agreements. The Agreements ensured the Participants that they would receive power generated by Projects 4 and 5 at cost; however, the Agreements also provided that the Participants assumed the risks of delays, cost increases and, at worst, a "dry hole." The Participants effectively were, as the result of their financial stake and potential control, co-owners of Projects 4 and 5.

From 1976 through 1981, $2.25 billion of WPPSS Bonds were issued by the Supply System to fund the construction costs of Projects 4 and 5. The WPPSS Bonds were sold pursuant to Official Statements, one for each of the fourteen offerings. These statements, prepared jointly by WPPSS, were identical in most material respects.

Amexco/US and the other bond purchasers were told in the Official Statements that the security for the payment of the WPPSS Bonds was the stream of payments required to be made by the Participants under the Participants' Agreements. Because the Participants' promises to fund the debt service on the WPPSS Bonds were the only security offered to the bondholders, other than the construction work itself, there would

have been no WPPSS Bonds sold unless the Participants had promised to make payments irrespective of whether the Projects were ever completed. Accordingly, the bond purchasers were assured in the Official Statements that the Participants were required to fund the bond debt service "come hell or high water." In addition, the identical opinions of the appellee attorneys, Wood, Dawson, Smith & Hellman ("Wood Dawson" or "Bond Counsel") and Houghton, Cluck, Coughlin & Riley ("Houghton Cluck") were attached to the Official Statements and unequivocally stated that seventy-two Participants had the authority to enter into the Participants' Agreements. Wood Dawson orally advised the American Express Companies that the fact that the opinions did not extend to all of the Participants was immaterial.

The Official Statements also described Projects 4 and 5, the need for their power generation, the anticipated costs of Projects 4 and 5, their projected completion dates and the Supply System's finances. Attached to and made part of the Official Statements were letters prepared by the appellee engineers, R.W. Beck and Associates, United Engineers and Constructors, Inc. and Ebasco Services, Inc. (collectively referred to as the "Engineers"). These letters set forth the need, feasibility and costs of Projects 4 and 5. The Official Statements also included financial information prepared by the Supply System's accountants, Ernst & Whinney, CPA's ("E&W"). E&W also prepared the Annual Statements, sent to Amexco/US, reflecting the Supply System's finances.

In addition to receiving the Official Statements and Annual Reports, the American Express Companies and other large financial institutions were given special attention by the Supply System, the professionals it employed and the Members and Participants. This special attention, which included numerous face-to-face meetings as well as tours, is not surprising because purchases by institutions were absolutely vital to the successful marketing of the WPPSS Bonds. Because of WPPSS' extensive sales campaign, the underwriters played a secondary role in the efforts made to convince Amexco/US and other large financial institutions to buy WPPSS Bonds.

The last Official Statement was issued on March 17, 1981. It represented, as had all previous Official Statements, that

Projects 4 and 5 could be completed at a commercially feasible cost and in a reasonable amount of time. Only two months later, the Supply System announced that work was being "suspended" on Projects 4 and 5.

On January 22, 1982, the Supply System Board of Directors terminated Projects 4 and 5, based upon its determination that it could not complete construction due to financing conditions beyond its control. It is now clear that all five projects were continuously plagued with delays and huge cost overruns far exceeding the disclosures in the Official Statements. Although all of the funds raised from Bond sales were purportedly spent towards construction of the projects, Project 4 was only twenty-three percent complete and Project 5 was only fourteen percent complete at the time of termination. It is now also clear that there was never a reasonable expectation that the marketplace could absorb sufficient bonds to finance the completion of the Projects. Moreover, it is now conceded that the power which would have been generated by Projects 4 and 5 is not needed.

The termination of the Projects triggered the Participants' obligations under the Participants' Agreements to commence funding the debt service on the Bonds as promised in the Official Statements. However, nearly every Participant promptly repudiated those obligations, which constituted the cornerstone of the Projects. In fact, when Chemical Bank, the WPPSS Bond trustee ("Chemical"), brought declaratory judgment actions to have the Participants' Agreements declared valid and binding, the Participants raised virtually every conceivable defense. Four of the primary defenses raised by the Participants indicate that the Participants knew from the beginning that they could repudiate their Participants' Agreements if it became expedient to do so. The Participants never disclosed the facts upon which these defenses were based and, instead, permitted contradictory disclosures to be made to Amexco/US and other Bond purchasers.

It is undisputed that Amexco/US and other WPPSS Bond purchasers, who relied on the assurances that all of the Participants' Agreements were valid, were never informed of the Participants' contrary beliefs or their intentions to repudiate their obligations. Amexco/US would not have made any purchases of WPPSS Bonds had any doubts as to the enforceability of the Participants' Agreements been disclosed.

Chemical's declaratory judgment action culminated in the Washington Supreme Court ruling that the Participants' Agreements were unenforceable. *Chemical Bank v. Washington Public Power Supply System*, 102 Wash. 2d 874, 691 P.2d 524 (1984), *cert. denied*, 471 U.S. 1075 (1985). Consequently, without a source of revenue, the Supply System defaulted on its bond obligations.

Commencement Of The Action And The Scienter Amendment

This action was commenced in the Washington State Superior Court in Seattle on May 7, 1984, seeking recovery primarily based upon various theories of negligence under Washington State law. It was complementary to the *WPPSS Federal Action*, which, in May 1984, had only been certified as a class for federal securities claims.[7] The First Amended Complaint in Intervention, filed by the American Express Companies in March 1985, and adopted by the United States Trust Company of New York, as Trustee, alleges, *inter alia*, that WPPSS is liable for primary and secondary violations of WSSA. Each of the Appellees is alleged to have negligently failed to disclose material facts related to the enforceability of the Participants' Agreements, the total cost of Projects 4 and 5, the management of the Projects, the feasibility of financing the Projects to completion, and the need for the Projects' electricity.

In April of 1985, approximately nine years after Amexco/US purchased its first WPPSS Bonds and a year after this litigation was commenced, WSSA was significantly modified by the Scienter Amendment. Certain negligence causes of action previously available were removed for those cases involving securities, such as the WPPSS Bonds, issued by Washington instrumentalities. The Scienter Amendment specifically excluded bond counsel and underwriters from its application:

> Under no circumstances whatsoever shall this subsection be applied to require purchasers to establish scienter on the part of bond counsels or underwriters.

Wash. Rev. Code § 21.20.430(7) (1985) (amended 1986).

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[7] Amexco/US is a member of the plaintiff class in the *WPPSS Federal Action*.

Based upon a number of arguments, including that the Scienter Amendment barred Amexco/US's negligence-based WSSA claims, all of the Appellees moved to dismiss this action on June 5, 1985. On July 26, 1985, the Superior Court judge orally ruled that all of the counts in Amexco/US's first amended complaint (and the Haberman Group's third amended complaint) should be dismissed, except for claims against Chemical Bank and certain WSSA claims against Bond Counsel and against the twenty Members who were also Participants. App. D at 87a.

On October 7, 1985, the Superior Court denied Amexco/US's motion for reconsideration as well as certain requests made by WPPSS, but granted WPPSS' request to dismiss the remaining claims. On that date, the trial court issued its Order and Judgment of Dismissal dismissing all claims against all of the Appellees. App. E at 102a. The trial court decided, *inter alia*, that the Scienter Amendment was constitutional, retroactive in its application and required a showing of scienter to recover from any of the Appellees except Wood Dawson. It held that even though Wood Dawson and Houghton Cluck issued identical opinions, Houghton Cluck was covered by the Scienter Amendment because it was special counsel, whereas Wood Dawson was not because it was "bond counsel".

A notice of appeal was filed by the Haberman Group on November 1, 1985 and by Amexco/US on November 6, 1985. On April 2, 1986, the Supreme Court of Washington accepted direct review.

Federal Decisions And The Retroactivity Amendment

On January 24, 1986, subsequent to the Washington Superior Court decision and prior to the briefing of the appeal to the Washington Supreme Court, the United States District Court ruled in the *WPPSS Federal Action* on the availability of WSSA claims to class members. The District Court held that the Scienter Amendment did not apply to events occurring prior to its enactment. *WPPSS Federal Action*, (Jan. 24, 1986) (order addressing motions to dismiss state law claims) at 11. Accordingly, the District Court did not reach the question of the constitutionality of the Scienter Amendment. *Id.* The court

also certified the WSSA class action negligence claims. *Id.* at 29. Amexco/US and the Haberman Group were, however, barred by the District Court from participating in those class action claims based upon the doctrine of *res judicata* because of the Washington State trial court's ruling in this action.[8] *WPPSS Federal Action*, (April 24, 1986)(order setting timetable and disposing of various motions) at 4.

Approximately six weeks after the Federal District Court's decision, the Washington legislature again amended WSSA, restating the Scienter Amendment and this time making the Scienter Amendment explicitly retroactive by adding the following language:

> The provisions of this subsection are retroactive and apply to any action commenced but not final before July 27, 1985. In addition, the provisions of this subsection apply to any action commenced on or after July 27, 1985.

Wash. Rev. Code § 21.20.430(7).

Senator Bottinger, a sponsor of the Retroactivity Amendment, described the justification for making the Scienter Amendment retroactive as follows:

> The action brought, and pending in court, by the bondholders alleging that they were mislead [sic] by the bond statements and the prospectuses that were issued by the underwriters should not be passed through. If they are successful, it should not be passed through to the rate payers on the theory of agency. So the vote here is, in my opinion, shall the underwriting firm that handled that bond issue and their bond counsels pay the bondholders, or shall the rate payers--the people of the state of Washington. This bill says not the rate payers.

Remarks of Senator Bottinger, *Journal of Senate Debates* 5 (Feb. 16, 1986). A statement of Senator Hayner responding to

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[8] The District Court rescinded this ruling on May 5, 1988. *WPPSS Federal Action*, (May 5, 1988) (oral order lifting *res judicata* bar). Although Amexco/US disagrees, defendants who are Appellees here have argued to the District Court that Amexco/US and the Haberman Group are barred from asserting WSSA negligence causes of action and can only assert WSSA scienter claims.

Senator Bottinger similarly described the rationale of the Retroactivity Amendment:

> Mr. President, may I proceed? There are many cases in the courts now dealing with the issue of who is responsible in the Washington Public Power Supply System debacle. What we are doing here is changing the playing field which existed at the time that some of those contracts were made--some of those actions which were taken which might be negligent and it appears to me that to do that now is totally unfair.
>
> Yes, we can do it. I don't doubt that we can do it, but it seems to me in all fairness that is not the way to deal with people. Now you can talk about rate payers all you want, but there are a lot of bondholders too that happen to be widows, orphans; there are pension funds that hold WPPSS bonds. There are all kinds of people out there--3,000 of them and I think at this point, it is only fair to leave it up to the court to decide which of those people are responsible.

Remarks of Senator Hayner, *Journal of Senate Debates* 6 (Feb. 16, 1986).

Following the enactment of the Retroactivity Amendment, after waiting more than five months for the Washington Supreme Court to rule on Amexco/US's appeal, the United States District Court ruled on April 30, 1987 that the Scienter and Retroactivity Amendments were unconstitutional. *WPPSS Federal Action*, 673 F. Supp. 411, 417 (W.D. Wash. 1987). The ruling was based upon the Federal District Court's finding that the Washington legislature was attempting impermissibly to interfere with the WPPSS Bond federal action.

Washington Supreme Court Decision

The Supreme Court of Washington, on October 8, 1987, announced its decision in this case, reaching a conclusion diametrically opposed to that of the United States District Court. The Washington Supreme Court, although finding that Amexco/US had properly asserted a cause of action under WSSA, decided that all of Amexco/US's WSSA negligence claims, except that against Wood Dawson, were extinguished because the Scienter and Retroactivity Amendments were constitutional. The Washington Supreme Court affirmed the

lower court decision that Houghton Cluck, although it issued an opinion identical to Wood Dawson's, was covered by the Amendments' scienter requirement.

First, the Washington court did not address Amexco/US's arguments that the Scienter Amendment violated the Commerce and Equal Protection Clauses because it decided that Amexco/US had no standing to assert those arguments. It did address, however, Wood Dawson's equal protection argument and rejected that claim, ruling that the Scienter Amendment's elimination of WSSA negligence claims against all defendants except Bond Counsel (and underwriters, which the Washington Supreme Court did not mention) passed the rational basis test. The court found that it was reasonable, on several grounds, to distinguish Bond Counsel from the other defendants.

Second,[9] the court ruled that Amexco/US's due process rights were not violated by the Retroactivity Amendment. Amexco/US was found not to have established any claim of entitlement.

Third, although not briefed or argued, the court held that the Amendments were not contrary to separation of powers principles. Presumably, the Washington Supreme Court reached out to decide this issue because separation of powers, as well as the concept of federalism, were the bases of the United States District Court's rulings that the Amendments were unconstitutional.

Finally, the court rejected the argument that the Amendments constituted an impermissible impairment of contract rights. The standard of liability under WSSA was found not to be part of the WPPSS Bond contract and the negligence standard was determined not to be an important factor in the WPPSS Bonds' ratings or the decisions made to purchase WPPSS Bonds.

Most of the Appellees promptly moved for reconsideration, on the ground that, *inter alia*, Amexco/US had failed to allege a cause of action under WSSA. If granted, the motion would have mooted the court's decision on the constitutionality of the Scienter and Retroactivity Amendments. The motions

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[9] The court also held, which is not relevant for this appeal, that the Amendments did not violate the prohibition in the Washington Constitution against special legislation.

were, however, denied by order dated February 19, 1988, App. C at 86a, and several words of the opinion were changed by order dated February 17, 1988. App. B at 85a.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I. The Scienter And Retroactivity Amendments Violate The Commerce Clause Of The Constitution

The Scienter and Retroactivity Amendments were intended to and do favor local parties over those from other states. The Washington legislature, by the enactment of these Amendments, has attempted to shift liability from the local utilities and their rate payers to the bond purchasers and the New York-based Bond Counsel and underwriters. In addition, the Amendments hold those involved with the issuance and sale of out-of-state securities to a higher standard of care than those involved with Washington securities. This blatantly protectionist legislation is *per se* invalid under the Commerce Clause of the Constitution.[10] Even if a balancing test were applied, the

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[10] Amexco/US's Article III standing to raise the issue of the constitutionality of the Scienter and Retroactivity Amendments under the Fourteenth Amendment's due process guarantee has never been contested. Amexco/US also has standing to raise the constitutionality of the Amendments under the Commerce Clause. Amexco/US, as an out-of-state bondholder, has been directly harmed by the Amendments' impermissible burden on interstate commerce. *See Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985). Furthermore, because Amexco/US concededly has standing to raise certain constitutional issues, it can raise "any relevant question of law in respect of" the challenged statute. *Federal Communications Comm'n v. Sanders Bros. Radio Station*, 309 U.S. 470, 477 (1940). *See also Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 78-79 (1978) (abandoning requirement of "subject-matter nexus" in non-taxpayer suits).

This Court should not defer to the Washington Supreme Court's erroneous finding that Amexco/US did not have standing to assert that the Scienter and Retroactivity Amendments violate the Commerce Clause. *Haberman*, 109 Wash. 2d at 138, 744 P.2d at 1055. First, standing is a federal question, to be decided anew by this Court. *Phillips Petroleum*, 472 U.S. at 804; *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 262 n.8 (1977).

substantial burden placed upon interstate commerce outweighs any legitimate putative benefit to Washington residents.

The Commerce Clause "limits the power of the States to erect barriers against interstate trade." *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 35 (1980). This Court applies a straightforward test to state regulation of commerce: " '[W]here simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected.' " *Id.* at 36 (quoting *City of Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978)). Because the Scienter and Retroactivity Amendments were enacted to protect two groups--local rate payers and certain parties involved in the issuance and sale of Washington securities--the Amendments are *per se* invalid as "simple economic protectionism."

In *New England Power Co. v. New Hampshire*, 455 U.S. 331 (1982), this Court struck down an effort to protect a state's utility consumers at the expense of out-of-state residents. Acting pursuant to New Hampshire law, the state's Public Utilities Commission had ordered New England Power Company, a member of a regional power pool serving six states, to cease selling hydroelectricity generated in New Hampshire anywhere but in New Hampshire. The Commission had determined that the state's energy needs were increasing rapidly and that New Hampshire rate payers would save millions of dollars annually if New England Power sold its hydroelectricity exclusively in New Hampshire. *Id.* at 336.

This Court found that the order was "designed to gain an economic advantage for New Hampshire citizens at the expense of New England Power's customers in neighboring states . . . [and] place[d] direct and substantial burdens on transactions in interstate commerce." *Id.* at 339. Likewise, in the case at

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Second, the Washington Supreme Court incorrectly relied on *Allen v. Wright*, 468 U.S. 737, 750-51 (1984), as support for its ruling that Amexco/US may not raise another's legal rights. Contrary to this Court's instruction in *Allen*, the Washington court "mechanically" applied restrictions on standing. *Id.* at 751. Moreover, *Allen* is easily distinguishable. Unlike Amexco/US, the respondents in *Allen* did not have Article III standing to raise any constitutional challenge. *Id.* at 753-66.

hand, the legislative history leaves no doubt that the Scienter and Retroactivity Amendments are designed to give an economic advantage to Washington rate payers at the expense of out-of-state Bondholders, New York counsel and Wall Street underwriters. *See* legislative history quoted *supra* pp. 11-12. The Amendments, like the order in *New England Power*, are "simple economic protectionism" in violation of the Commerce Clause. 455 U.S. at 339. *See Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 580 (1986) ("While a State may seek lower prices for its consumers, it may not insist that producers or consumers in other States surrender whatever competitive advantages they may possess.").

Relying on *New England Power*, the Eighth Circuit Court of Appeals ruled that a state cannot– –as the State of Washington has done– –lawfully protect its citizens from rate increases by shifting the costs of power plant construction and operation to citizens of other states. *Middle South Energy, Inc. v. Arkansas Public Serv. Comm'n*, 772 F.2d 404, 416-17 (8th Cir. 1985), *cert. denied*, 474 U.S. 1102 (1986). In *Middle South*, the Arkansas Power and Light Company ("AP&L") had entered into an agreement to pay portions of the construction and operating costs of a regional nuclear power plant on specified dates, whether or not the plant was then operating. The payments were to be credited to later power purchases by AP&L. *Id.* at 407. When it became clear that the power from the nuclear facility would be relatively expensive, the Arkansas Public Service Commission ("APSC") "sought to 'protect the interests of the residential, business, and industrial customers of AP&L and preserve the viability of the economy of the State of Arkansas.'" *Id.* at 408 (quoting *Arkansas Power & Light Co.*, Ark. Pub. Serv. Comm'n Docket No. 84-040-OII at 2 (Mar. 12, 1984)). The APSC ordered AP&L to show cause why its contracts and agreements to purchase power from or to pay for construction and operating costs of the project "should not be held to be void *ab initio* as a matter of law" because the agreements had not yet received required state regulatory approval. *Middle South*, 772 F.2d at 408 (quoting *Arkansas Power & Light Co.*, Ark. Pub. Serv. Comm'n Docket No. 84-190-U, at 6 (Aug. 1, 1984)).

The Court of Appeals found that, despite the APSC's ostensible rationale for the action, the discriminatory effect and discriminatory purpose of the APSC order were obvious. *Middle South*, 772 F.2d at 416. The court enjoined the APSC from further proceedings, finding that Arkansas had sought to "deflect" rate increases from its citizens by shifting the burden to the citizens of other states. *Id.* at 416-17. This is, of course, precisely the purpose of the Scienter and Retroactivity Amendments--shifting the burden of the nuclear construction debacle to citizens of other states.

The Scienter and Retroactivity Amendments also violate *per se* the Commerce Clause because they discriminate between Washington State issuers of securities and out-of-state issuers of securities. To recover from a Washington issuer under WSSA after the passage of the Scienter and Retroactivity Amendments, an injured party must prove that the issuer acted with scienter. To recover from issuers of securities from all other states, however, an injured party may assert a mere negligence cause of action. This protectionist legislation, by giving a clear advantage to Washington issuers, impedes the sale of securities in Washington by out-of-state issuers. Similar legislation has been declared *per se* unconstitutional by this Court. *See, e.g., Brown-Forman*, 476 U.S. at 582 (state cannot directly or indirectly control price of liquor sold in other states); *Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 272-73 (1984) (tax exemption for certain locally produced liquor violates the Commerce Clause even if no other state produces that liquor).

Even if the Scienter and Retroactivity Amendments were not *per se* invalid, they would be invalid under the test established by this Court to review facially neutral statutes that affect interstate commerce only indirectly.[11] As this Court explained in *Lewis:* "In contrast [to 'simple economic protectionism'], legislation that visits its effects equally upon both interstate and local business may survive constitutional scrutiny if it is narrowly drawn." 447 U.S. at 36. The state's interest

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[11] In fact, the Scienter Amendment is not facially neutral; it expressly applies only to "an initial offer or sale of securities . . . made by this state or its agencies, political subdivisions, municipal or quasi-municipal corporations" or instrumentalities thereof and specifically excludes bond counsel and underwriters from its coverage.

must be legitimate and the local benefits must outweigh the burden on interstate commerce. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970) (Arizona cannot require cantalopes grown in Arizona to be packed in Arizona before shipment out of state); *Lewis*, 447 U.S. at 36-44 (state may not prohibit out-of-state banks, bank holding companies and trust companies from owning or controlling a business selling investment advisory services in Florida).

Washington's interest is, quite obviously, to keep utility rates low for its rate payers. This putative benefit is clearly outweighed by the burdens on interstate commerce. To begin with, the Amendment shifts the cost from the Washington rate payers to the mostly out-of-state bondholders, New York Bond Counsel and Wall Street underwriters. Thus, the rates are only being kept down because the cost has been shifted to citizens of other states. The benefits cannot, therefore, possibly outweigh the burdens. Moreover, the entire municipal bond market may be damaged because of the lack of confidence which may be engendered by Washington's attempt to shift its liability to other parties.

There is no imaginable legitimate benefit in limiting the coverage of the Scienter and Retroactivity Amendments to Washington issuers. The burdens are obvious. Non-Washington issuers are placed at an extreme disadvantage in Washington. Out-of-state issuers must choose between not selling their securities in Washington and subjecting themselves to liability for mere negligence, although in-state issuers are liable only for scienter. Non-Washington issuers may be forced to sell securities at a higher price than Washington issuers because of the difference in liability. This may make some securities unsaleable in Washington. The Amendments, consequently, deprive non-Washington issuers of potential investors, substantially burdening interstate commerce.

II. The Scienter And Retroactivity Amendments Violate The Equal Protection Clause Of The Constitution

The Scienter and Retroactivity Amendments violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution because (i) by expressly excluding bond counsel and underwriters from the elimination of the negligence cause of action, the Scienter and Retroactivity

Amendments single out the State of Washington, its instrumentalities and certain of its agents for special treatment; and (ii) the Scienter and Retroactivity Amendments favor issuers and participants in the sale of Washington securities over those issuing and participating in the sale of out-of-state securities.[12] Washington's purpose in drawing these distinctions is not legitimate and thus the Amendments plainly violate the Equal Protection Clause. The classification made in the Amendments bears no rational relationship to any legitimate purpose and is unconstitutional for this reason as well.

The general rule is that economic legislation, such as the Scienter and Retroactivity Amendments, which do not affect fundamental rights or rely on suspect classifications, offend the Equal Protection Clause if the classification created by the legislation bears no rational relationship to a legitimate state interest. *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 440 (1985); *Schweiker v. Wilson*, 450 U.S. 221, 229 (1981); *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 174-75 (1980); *Vance v. Bradley*, 440 U.S. 93, 97 (1979); *New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). Equal protection denies government "the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective" of the enactment. *Reed v. Reed*, 404 U.S. 71, 75-76 (1971). A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all

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[12] As discussed *supra* note 10, Amexco/US has standing to raise all aspects of the constitutionality of the Scienter and Retroactivity Amendments. In addition, even if Amexco/US has no standing on its own to raise certain equal protection arguments, it can raise those arguments on behalf of Wood Dawson. In the Washington Supreme Court, Wood Dawson argued that the classification in the Amendments violated the Equal Protection Clause. Wood Dawson is deemed a party in this Court because it was a party below. Sup. Ct. R. 10.4. Amexco/US, therefore, has standing to raise equal protection arguments. *Director, Office of Workers' Compensation Programs v. Perini North River Assoc.*, 459 U.S. 297, 303-05 (1983) (applying Court's Rule 19.6, which is virtually identical to Rule 10.4 but deals with petitions for certiorari rather than appeals under 28 U.S.C. § 1257 (1988)).

persons similarly circumstanced shall be treated alike." *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920). *See Plyler v. Doe*, 457 U.S. 202 (1982).

A two-part analysis is employed for equal protection challenges. As this Court explained in *Metropolitan Life Ins. Co. v. Ward:*

> In the equal protection context . . . *if the State's purpose is found to be legitimate*, the state law stands as long as the burden it imposes is found to be rationally related to that purpose, a relationship that is not difficult to establish.

470 U.S. 869, 881 (1985)(emphasis supplied). Under this test, if the state's purpose for the classification is *not* "legitimate", there is no reason to reach the "rational relationship" issue.

A. The Amendments Unconstitutionally Distinguish Between Bond Counsel And Underwriters And The Other Parties

The distinction drawn between bond counsel and underwriters, on the one hand, and all the other parties, on the other, violates the Equal Protection Clause for two reasons. First, the purpose for which the distinction has been drawn is not legitimate. Second, the discrimination against bond counsel and underwriters is not rationally related to any imagined legitimate purpose.

This Court has held that a legislature's desire to harm a politically unpopular group cannot constitute a legitimate governmental interest. *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 534 (1973). The Court found that the statutory amendment at issue in *Moreno* was intended to prevent "hippies" and "hippie communes" from participating in the food stamp program. The Court held:

> The challenged classification clearly cannot be sustained by reference to this congressional purpose. For if the constitutional conception of "equal protection of the laws" means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest. As a result, "[a] purpose to discriminate against hippies cannot,

> in and of itself and without reference to [some independent] considerations in the public interest, justify the 1971 amendment."

Id. at 534-35 (quoting *Moreno v. United States Dep't of Agric.*, 345 F. Supp. 310, 314 n.11 (D.D.C. 1972)) (emphasis in original).

It is apparent from the legislative history of the Scienter and Retroactivity Amendments that the Washington State legislature intended to discriminate against a group which they disfavored--New York Bond Counsel and Wall Street underwriters. The purpose of the legislation was clearly stated by a primary sponsor of the Scienter Amendment, Senator Bottinger--to place the burden of paying for the WPPSS Bond disaster on the shoulders of bondholders, Bond Counsel and underwriters rather than the Washington rate payers. *See supra* pp. 11-12. The State's illegitimate discriminatory purpose is highlighted by the fact that two law firms, who issued identical opinion letters, were treated differently based solely on their state residence. Washington counsel, Houghton Cluck, falls within the Scienter Amendment's protections whereas New York counsel, Wood Dawson, does not.

Under *Moreno*, the State of Washington's attempt to discriminate against disfavored groups is not legitimate. Because the intention of the Scienter and Retroactivity Amendments is not legitimate, the Amendments violate the Equal Protection Clause.

Even if the Court were able to discern some legitimate state purpose for the legislation, there is no rational relationship between the classifications created by the Scienter and Retroactivity Amendments and any imagined purpose. The Supreme Court of Washington, however, identified several "rational" justifications for the distinction drawn in the Scienter and Retroactivity Amendments between bond counsel, on the one hand, and the issuer and the other professionals employed by the issuer, on the other: (i) bond counsel should be held to a higher standard of care because of their expertise; (ii) bond counsel are in the best position to protect the public from misrepresentations or omissions in the sale of securities; (iii) bond counsel perform a task different from the other professionals involved in the issuance and sale of bonds; and (iv)

bond counsel are more profit-oriented and less public interest oriented than other agents of a public issuer. Presumably, these justifications apply to the distinction drawn between underwriters, on the one hand, and the issuer and the other professionals, on the other. The Washington court's finding that these "objectives" bear any relationship to the Scienter and Retroactivity Amendments is plainly incorrect.

First, the court's rationalization that bond counsel and underwriters should be held to a higher standard of care because of their expertise is ill-founded. All of the professionals employed by the issuer have some special expertise, but the legislature held only two of the professionals to a scienter standard. Of course, where the issuer and those working with it negligently make misrepresentations or omissions to bond counsel and the underwriters, the lawyers and investment bankers, regardless of their expertise, are unable to protect the public. Moreover, Bond Counsel and local counsel for the WPPSS Bond offerings, Houghton Cluck, issued identical opinions. Thus, the unique expertise of New York Bond Counsel is immaterial. In addition, the misrepresentations made to Amexco/US were made primarily by WPPSS and not by underwriters, who played a secondary role in marketing the WPPSS Bonds to large financial institutions.

Second, the rationalization that bond counsel and underwriters are in the best position to protect the public from misrepresentations is difficult to comprehend. How bond counsel and underwriters could reasonably protect against negligence, as opposed to fraud, of the issuer and the other professionals it employed is unclear. A chain is only as strong as its weakest link. If the other links are weak, then bond counsel and the underwriters alone cannot protect the investing public from the negligent failure of others to disclose material information.

Third, the court's finding that different professionals with different tasks could be held to different standards is unsupportable. To begin with, as pointed out, Bond Counsel and the Washington special counsel rendered the same opinion and thus did not perform distinctly different tasks. In addition, large financial institutions like Amexco/US were only secondarily looking to underwriters. Finally, to the extent any of the professionals acted negligently, bondholders could be damaged.

Fourth, the court's characterization of bond counsel as being more profit-motivated is incorrect. The Members and Participants had a profit motive themselves– –they intended to sell excess inexpensive WPPSS power to out-of-state utilities at a significant profit. The other professionals employed by the Supply System had the same profit motive as did Bond Counsel and the underwriters.

The intent and impact of the Amendment is that the State of Washington and its instrumentalities are singled out for special treatment from which bond counsel and underwriters are excluded. There is no legitimate purpose which is rationally related to this distinction.

B. The Amendments Unconstitutionally Distinguish Between Washington State Securities and Securities Of Other States

The Scienter and Retroactivity Amendments create a distinction between in- and out-of-state bond issues. The Amendments apply only to bonds issued by Washington State or its subdivisions or quasi-municipal Washington corporations. Those involved with the issuance and sale of non-Washington municipal bonds may be liable if their actions are negligent. For example, a New York utility selling its bonds in Washington would be liable for negligence although a Washington utility selling its bonds to the same person would only be liable if it were guilty of fraud. There is no legitimate reason for this discrimination and, consequently, the Amendments are unconstitutional.

The Supreme Court has repeatedly struck down this type of resident versus non-resident preferential treatment under the Equal Protection Clause. *See, e.g., Hooper v. Bernalillo County Assessor*, 472 U.S. 612 (1985); *Zobel v. Williams*, 457 U.S. 55 (1982); *Attorney Gen. of New York v. Soto-Lopez*, 476 U.S. 898 (1986). In *Metropolitan Life*, the Court stated: "[T]his Court always has held that the Equal Protection clause forbids a State to discriminate in favor of its own residents solely by 'burdening the residents of other State members of our federation.' " 470 U.S. at 878 (quoting *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 533 (1959)).

In *Metropolitan Life*, the Court refused to uphold a distinction between in- and out-of-state interests like the one

drawn by the Scienter Amendment. The statute in question taxed local insurance companies at a lower rate than out-of-state insurance companies. The state tried to justify the discrimination between local and out-of-state interests as being necessary to (i) encourage the formation of new domestic companies and (ii) encourage capital investment in the state assets and government securities specified in the statute in question. 470 U.S. at 873.

The Supreme Court found both purposes to be illegitimate, noting:

> Alabama's aim to promote domestic industry is purely and completely discriminatory, designed only to favor domestic industry within the State, no matter what the cost to foreign corporations also seeking to do business there. Alabama's purpose . . . constitutes the very sort of parochial discrimination that the Equal Protection Clause was intended to prevent.

Id. at 878. The Court remanded the case so that a determination could be made as to the legitimacy and rational relationship to the statute of other, previously unexamined, purposes suggested by the state.

In this case, the Washington Supreme Court did not state any rationale for the Scienter Amendment's distinction between in-state and out-of-state bond issues. However, it is obvious on the face of the Scienter Amendment that there is no rational relationship between the discrimination against out-of-state bond issues and any legitimate legislative purpose. Like the Alabama statute in *Metropolitan Life*, the Scienter and Retroactivity Amendments were designed to discriminate against out-of-state residents in order to benefit those within the state. There is no legitimate purpose for this discrimination and, consequently, the Amendment is unconstitutional under the Equal Protection Clause.[13]

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[13] The legislature has explicitly stated its desire not to protect underwriters or bond counsel under any circumstances. If the exclusion of bond counsel and underwriters is held to be unconstitutional, the Amendments must be invalidated in their entirety. *See Frost v. Corporation Comm'n*, 278 U.S. 515, 525 (1929) (a portion of a statute may not be excised if to do so would broaden the coverage of the statute beyond the reach intended by the legislature). *See also Davis v. Wallace*, 257 U.S. 478, 484 (1922).

III. The Retroactivity Amendment Violates The Due Process Clause Of The Constitution

The Retroactivity Amendment violates the procedural due process guarantee by depriving Amexco/US of its right to a cause of action based on negligence without meaningful due process appropriate to the nature of this case. Furthermore, the Retroactivity Amendment lacks any rational relation to a legitimate legislative end in contravention of substantive due process guarantees.

A. Amexco/US Was Denied Procedural Due Process

Procedural due process guarantees that the procedures followed in depriving a person of life, liberty or property are constitutionally adequate. A procedural due process analysis requires: first, identifying the affected property interest and, second, determining the adequacy of the process followed. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982).

Amexco/US's property interest is its WSSA negligence cause of action. In *Logan*, this Court held that "[a] cause of action is a species of property protected by the Fourteenth Amendment's Due Process Clause." *Id.* at 428. In that case, the Court determined that Logan had a property interest in his discrimination claim lodged with the Illinois Fair Employee Practices Commission even though the Illinois Supreme Court held otherwise.

Logan filed a timely claim with the Commission. The claim was dismissed, however, because the Commission convened a hearing after the proscribed time. Logan appealed the dismissal on the ground he was denied due process in the treatment of his claim. The Illinois Supreme Court held that no property interest was created by the Fair Employee Practices Act absent appropriate action by the Commission. This Court disagreed, holding that Logan had a property interest in his discrimination claim, and finding that "[a] claimant has more than an abstract desire or interest in redressing his grievance." *Id.* at 431.

A cause of action in tort has been specifically recognized as a property right. In *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), the plaintiff challenged the constitutional adequacy of a state law's notice provisions. The law authorized the settlement of common trust fund accounts upon publication of newspaper notice. The settlement cut off the beneficiaries' "rights to have the trustee answer for negligent or illegal impairments of their interests." *Id.* at 313. These tort claims were held to be property rights protected by the Fourteenth Amendment. *See also Logan*, 455 U.S. at 428 n.4 (quoting *Martinez v. California*, 444 U.S. 277, 281-82 (1980)) ("'[a]rguably,' a state tort claim is a 'species of property protected by the Due Process Clause'").

The Washington Supreme Court erroneously believed that Amexco/US was claiming a property interest "in the continuation of existing statutory law." *Haberman*, 109 Wash. 2d at 142, 744 P.2d at 1057 (1987). Under this mistaken belief, the court concluded that no property right existed "to the pre-amendment terms" of the statute. *Id.* at 143, 744 P.2d at 1058. Amexco/US is, in fact, claiming that the property interest affected is its tort cause of action under WSSA. *See WPPSS Federal Action*, (Jan. 24, 1986)(order addressing motions to dismiss state law claims) at 8-9 ("In making negligent violations of that section no longer actionable against certain defendants, the Amendment takes away a cause of action that was previously available.").

The Retroactivity Amendment deprives Amexco/US of the WSSA negligence cause of action without due process. At a minimum, adequate due process entails notice and an opportunity to be heard. As this Court explained in *Boddie v. Connecticut:* "What the Constitution does require is 'an *opportunity* . . . granted at a meaningful time and in a meaningful manner, for [a] hearing appropriate to the nature of the case.'" 401 U.S. 371, 378 (1971)(citations omitted). *See Logan*, 455 U.S. at 433 (due process requires that an individual have "the opportunity to present his case and have its merits fairly judged"). Legislative determination was not constitutionally adequate process in this instance. Amexco/US did not receive notice that the legislature was contemplating the Retroactivity Amendment. There was no opportunity to be heard and, because Amexco/US is not a citizen of the State of

Washington, there was no one to represent Amexco/US's interests in the state legislature.

Adequate procedural due process also requires an impartial decision maker. *Gibson v. Berryhill*, 411 U.S. 564 (1973) (Board of Optometry disqualified from conducting hearings because of bias and pecuniary interest). The legislature cannot be considered impartial in this instance. It was balancing in-state rate payers who could be forced to absorb all the costs of WPPSS' liability against bondholders, located primarily out-of-state, left with worthless bonds. The legislature, made up of the rate payers' elected representatives, had an unavoidable pecuniary interest. *See Gibson*, 411 U.S. at 579 (financial stake need not be direct).

Although this Court has suggested that, in some instances, legislative process is all the process that is due, *see Logan*, 455 U.S. at 432-33, citing *Martinez*, 444 U.S. 277, such rulings are not applicable to this case. For example, in *Martinez*, plaintiff's own legislature had enacted a statute granting government employees immunity from suit. Unlike *Martinez*, the Washington legislature did not include any elected representative of Amexco/US and did not serve Amexco/US's interests.

B. Amexco/US Was Denied Substantive Due Process

The Retroactivity Amendment was enacted for an improper, protectionist purpose. Moreover, the Amendment has no relation to any legitimate end. Consequently, the enactment of the Retroactivity Amendment denied Amexco/US its right to substantive due process.

Legislation may offend the Due Process Clause under a substantive due process analysis if the content of the legislation is particularly harsh and oppressive. *Welch v. Henry*, 305 U.S. 134 (1938). The well established standard of review under a substantive due process analysis is whether the legislation serves a rational means to a legitimate legislative end. *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59 (1978). However, given the self-interest of the Washington legislature in this matter--its constituents' liability for the WPPSS Bond losses--a stricter standard of review is required. As this Court explained in *United States Trust Co. v. New Jersey*, 431 U.S. 1, 26 (1977), "complete deference to a

New Jersey, 431 U.S. 1, 26 (1977), "complete deference to a legislative assessment of reasonableness and necessity is not

The Retroactivity Amendment must be scrutinized separate and apart from the Scienter Amendment. As this Court explained:

> It does not follow, however, that what Congress can legislate prospectively it can legislate retrospectively. The retrospective aspects of legislation, as well as the prospective aspects, must meet the test of due process, and the justifications for the latter may not suffice for the former.

Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 16-17 (1976).

The legislative history leaves no doubt as to the end sought to be achieved by the passage of the Retroactivity Amendment – –shifting the burden of paying for the nuclear power plant construction debacle from in-state rate payers to predominantly out-of-state bondholders. There is, of course, a relation between the stated purpose and the Retroactivity Amendment. As the legislature intended, Amexco/US's cause of action in negligence was eliminated.

Protecting in-state rate payers at the expense of out-of-state bondholders is not a legitimate legislative end. The Retroactivity Amendment is exactly the type of protectionist legislation found invalid under the Commerce Clause. *See Middle South Energy, Inc. v. Arkansas Public Serv. Comm'n*, 772 F.2d 404 (8th Cir. 1985), *cert. denied*, 474 U.S. 1102 (1986), and discussion *supra* pp. 14-18. Moreover, the very act of removing the negligence claim from the court is suspect. *See United States v. Klein*, 80 U.S. (13 Wall) 128, 146 (1872) ("Can we . . . [uphold the legislation] without allowing one party to the controversy to decide it in its own favor? Can we do so without allowing that the legislature may prescribe rules of decision to the Judicial Department of the government in cases pending before it? We think not. . . .").

The Retroactivity Amendment has no relation to any legitimate legislative end identified by the Washington Su-

preme Court. *See supra* pp. 20-24. The Amendment does not help municipalities keep valued employees, bring the state securities law in line with federal legislation or spread the cost of the construction debacle. Legislation is arbitrary and irrational in the absence of such a connection and, therefore, fails to afford Amexco/US its constitutionally mandated substantive due process rights. *See Connolly v. Pension Benefit Guar. Corp.*, 475 U.S. 211, 229 (1986) ("Our recent cases leave open the possibility that the imposition of retroactive liability on employers for the benefit of employees may be arbitrary and irrational in the absence of any connection between the employer's conduct and some detriment to the employee.").

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted,

STEPHEN A. WEINER
DAVID G. KEYKO*
SUSAN J. KOHLMANN
WINTHROP, STIMSON, PUTNAM & ROBERTS
40 Wall Street
New York, New York 10005
(212) 943-0700

Attorneys for Appellants American Express Companies

and

WALTER S. TABLER
SMITH, SMART, HANCOCK, TABLER & MIDDLEBROOKS
3800 Columbia Seafirst Center
701 Fifth Avenue
Seattle, Washington 98104
(206) 624-7272

Attorneys for Appellants American Express Companies and United States Trust Company of New York, as Trustee

*Counsel of Record

May 18, 1988

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APPENDIX A

OPINION AND JUDGMENT
DATED OCTOBER 8, 1987
OF THE WASHINGTON SUPREME COURT
AS REPORTED AT 109 WASH. 2d 107

[No. 52559-5. En Banc. October 8, 1987.]

FREDRIC HABERMAN, ET AL, *Appellants*, v. WASHINGTON PUBLIC POWER SUPPLY SYSTEM, ET AL, *Respondents*.

[1] **Dismissal and Nonsuit — Failure To State Claim — Factual Basis — Hypothetical Facts.** Dismissal of an action for not stating a claim upon which relief can be granted under CR 12(b)(6) is appropriate only if beyond doubt the plaintiff could not prove any set of facts, including facts outside the record which are consistent with the complaint, which would entitle him to relief.

[2] **Dismissal and Nonsuit — Failure To State Claim — Conversion to Summary Judgment — Relevance of Matters Outside Pleadings.** A trial court's consideration of materials outside the complaint does not convert a motion to dismiss for failure to state a cause of action under CR 12(b)(6) into a motion for summary judgment under CR 56 if the court concludes that the plaintiff cannot obtain relief no matter what facts he proves.

[3] **Judgment — Res Judicata — Prior Determination.** The doctrine of res judicata bars only those claims which necessarily were decided in a previous action.

[4] **Bonds — Securities Regulation — Security — Bond Guaranty.** A public instrumentality's indirect bond guaranty which could not be purchased separately from the bonds does not constitute a security independent of the bonds themselves.

[5] **Securities Regulation — Statutory Provisions — Construction — Purpose.** The Securities Act of Washington

(RCW 21.20) is construed broadly to carry out its purpose of protecting investors.

[6] **Securities Regulation — Civil Remedy — "Seller" — Privity — Necessity.** Under RCW 21.20.430(1), which makes sellers of securities civilly liable for unlawful sales, a party qualifies as a "seller" if his acts were a substantial contributive factor in the sales transaction.

[7] **Conflict of Laws — Securities Regulation — Choice of Law — Significant Contacts.** A securities claim is governed by the law of the jurisdiction having the most significant relationship with the security. The significance of the relationship depends on the competing jurisdictions' contacts with the events giving rise to the claim and the interests and policies of the jurisdictions.

[8] **Commerce — State Regulation — Validity — Factors.** The validity of a state regulation under the commerce clause depends on the relationship between the state, the subject matter, and the parties; the existence of a conflict between the state and federal regulations; and the degree of the burden placed on interstate commerce in relation to the local interests served.

[9] **Statutes — Validity — Presumption — Burden of Proof.** A party challenging the validity of a statute must overcome the presumption that the statute is constitutional by proving its invalidity beyond a reasonable doubt.

[10] **Constitutional Law — Equal Protection — Classifications — Minimal Scrutiny — Test.** A statutory classification not involving a suspect class or a fundamental right does not violate the equal protection guaranty if all members of each class are treated alike, there is a reasonable basis for distinguishing between those included in and those excluded from each class, and the classification is rationally related to the purpose of the statute.

[11] **Securities Regulation — Civil Remedy — In-State Public Issuer — Statutory Provisions — Validity.** RCW 21.20.430(7), which establishes a scienter requirement to hold the State and its subdivisions civilly liable for securities act violations and makes this requirement retroactive, does not violate the constitutional equal protection, special legislation, due process, separation of powers, or impairment of contracts clauses.

[12] **Statutes — Validity — Special Legislation — Test.** A statute establishing a class does not violate the special legislation prohibition of Const. art. 2, § 28(17) if it applies alike to all members within the class and the classification is reasonably related to the purpose of the statute.

[13] **Statutes — Construction — Retroactivity — Due Process — In General.** The retroactive application of a statute violates due process only if it interferes with a vested liberty or property right. A claimant has no vested liberty or property right in the continuation of existing statutory law.

[14] **Statutes — Construction — Retroactivity — Separation of Powers.** A retroactive statutory amendment does not violate the separation of powers doctrine if it establishes new law to be applied to the facts before the court, does not dictate how factual issues are to be decided, and does not affect a final judgment.

[15] **Statutes — Construction — Retroactivity — Impairment of Contracts.** A retroactive statutory amendment changing a remedy does not impair the obligation of a contract executed before the amendment unless the Legislature intended that the statute create private rights of a contractual nature or the remedy was incorporated as a term of the contract.

[16] **Corporations — Derivative Action — Defense — Standing.** In a derivative action, the entity which the plaintiff ultimately seeks to represent has standing to challenge the plaintiff's authority to bring the action.

[17] **Corporations — Derivative Action — Standing — Bondholder — Equitable Right.** A bondholder has no equitable right to bring a derivative action to enforce a right of the bond issuer.

[18] **Corporations — Derivative Action — Standing — Bondholder — Indenture Agreement.** A bondholder's contractual right to bring a derivative action is limited by restrictions in the indenture agreement if the bonds refer to the agreement.

[19] **Corporations — Derivative Action — Standing — Bondholder — Prior Demand on Trustee — Necessity.** When a bond indenture agreement requires bondholders to demand that the bond trustee bring a derivative action to enforce the rights of the issuer, whether the bondholders are excused from the demand requirement before commencing their own derivative action is a decision within the trial court's discretion. The doctrine of futility does not excuse demand if the trustee was involved neither in the wrongdoing sought to be remedied nor in an action arising out of the same facts as the bondholders' derivative action. The demand requirement is not excused by a running of a statutory limitation period after the bondholders' derivative action is commenced.

[20] **Credit — Creditor's Equitable Action — Condition Precedent.** Absent statutory provisions to the contrary, a creditor must reduce the debt to judgment before bringing an action in equity to satisfy his claim.

[21] **Government — Torts — Sovereign Immunity — Discretionary Acts — What Constitutes.** A governmental body is not immune from tort liability unless its act, omission, or decision involves the formulation of basic policy at an executive level, rather than the implementation of such policy.

[22] **Government — Torts — Public Duty Doctrine — Special Relationship — Class of Persons.** The public duty doctrine does not immunize a governmental body

from tort liability for its breach of a duty owed to a particular circumscribed class of persons rather than to the public as a whole.

[23] **Conflict of Laws — Torts — Choice of Law — Sovereign Immunity — Significant Relationship.** A court will apply the most significant relationship test to determine if a foreign jurisdiction's sovereign immunity will bar a tort claim. Among the factors which must be considered are the competing policies of the jurisdictions, the place of the injury, the place where the conduct causing the injury occurred, the residences of the parties, the place where the relationship is centered, and any choice of law provision in the contract out of which the tort claim arose.

[24] **Conflict of Laws — Torts — Choice of Law — Sovereign Immunity — Full Faith and Credit.** The full faith and credit clause does not require the application of a foreign jurisdiction's sovereign immunity unless not to do so would threaten the foreign jurisdiction's ability to govern.

[25] **Conflict of Laws — Comity — Discretion of Court.** The doctrine of comity permits, but does not require, a state to apply the laws of a foreign jurisdiction out of deference and respect after considering the interests of each jurisdiction. Basing a choice of law decision on considerations of comity is a matter within the court's discretion.

[26] **Negligence — Misrepresentation — Elements of Tort.** A party who fails to exercise reasonable care in obtaining or communicating false information involving a transaction in which he has a pecuniary interest is liable for pecuniary loss caused by justifiable reliance on the information if the supplier of the information knows of the injured party's reliance or has special reason to know that some member of a limited group will rely on the information, or the injured party is a member of a group which the supplier sought to influence.

[27] **Fraud — Complaint — Specificity — Test.** A complaint seeking damages for common law fraud satisfies the particularity requirement of CR 9(b) if it describes the fraud, alleges that the defendant committed it, and gives the defendant sufficient notice to allow him to prepare an answer and defense.

[28] **Fraud — Misrepresentation — Scope of Duty — Privity.** A person who fraudulently conceals or misstates information in a business transaction is liable to persons whom the person intends or has reason to expect will be misled by his acts. Privity or a fiduciary relationship between the parties is not a condition precedent to liability in such a situation.

[29] **Attorney and Client — Consumer Protection — Law or Other Professional Practice — Scope — Malpractice.** A claim for damages based on an attorney's or other professional's negligence in the exercise of his judgment is not cognizable under the Consumer Protection Act (RCW 19.86).

[30] **Waters — Irrigation Districts — Status — Municipal Corporations.** Irrigation districts established pursuant to RCW Title 87 qualify as municipal corporations.

[31] **Utility Services — Consumer Protection — Scope — Rural Electric Cooperatives.** Rural electric cooperatives are immune from liability under the Consumer Protection Act (RCW 19.86).

[32] **Pleading — Amendment — Relation Back — New Parties — Plaintiffs.** CR 15(c), which governs whether amendments to pleadings relate back to the original filing date for statute of limitation purposes, applies to the claims of newly added plaintiffs as well as newly added defendants.

[33] **Pleading — Amendment — Addition of Party — Inexcusable Neglect.** A complaint may not be amended to add an additional party if the moving party's failure to include the omitted party initially was due to in-

excusable neglect. The nonmoving party need not show prejudice from the addition of the additional party.

[34] **Process — Service — Foreign Party — Degree of Compliance.** Service of process on an out-of-state party requires strict compliance with the procedures set forth in RCW 4.28.080(14) and .180. Receipt of process and actual notice do not, by themselves, establish valid service of process.

PEARSON, C.J., and DOLLIVER and ANDERSEN, JJ., dissent in part by separate opinion; CALLOW, J., did not participate in the disposition of this case.

Nature of Action: Holders of revenue bonds in default which were issued to finance the construction of two terminated nuclear power plants sought damages under multiple theories from various parties involved in the construction and financing of the plants.

Superior Court: The Superior Court for King County, No. 84-2-06452-8, Terrence A. Carroll, J., on October 7, 1985, dismissed the action for failure to state a claim upon which relief could be granted.

Supreme Court: Holding that the bondholders had stated cognizable claims for violation of the state securities act, negligent, misrepresentation, and common law fraud, and that the claims of bondholders added by an amendment to the complaint related back to the date the action was filed, the court *affirms* the judgment in part, *reverses* it in part, and *remands* the case to the trial court for further proceedings.

Ferguson & Burdell, by *Christopher Kane* and *Scott Tucker*, and *Thoreson, Yost, Berry & Matthews*, by *Ernest C. Matthews IV* (*Myer Feldman, Robert L. Deitz, Edward J. Tolchin*, and *Ginsburg, Feldman & Bress; Robert H. Jaffe, Howard G. Schlesinger*, and *Jaffe & Schlesinger*, of counsel), for appellants Haberman, et al.

Smith, Smart, Hancock & Tabler, by *Walter S. Tabler* (*Winthrop, Stimson, Putnam & Roberts*, by *John B. Daniels, David G. Keyko*, and *Susan J. Kohlmann*, of counsel), for appellants American Express Travel Related Services Co., et al.

Culp, Dwyer, Guterson & Grader, by *Robert D. Stewart*, and *Donovan, Leisure, Newton & Irvine*, by *Daniel R. Murdock*, for respondent Washington Public Power Supply System.

Helsell, Fetterman, Martin, Todd & Hokanson, by *David F. Jurca* and *Linda J. Cochran*, for Columbia respondents.

Syrdal, Danelo, Klein, Myre & Woods, by *Peter A. Danelo* and *Otto G. Klein III (S. William Livingston, Jr., Peter J. Nickles*, and *Covington & Burling*, of counsel); *Davis, Wright & Jones*, by *Evan L. Schwab, Stephen M. Rummage*, and *David C. Tarshes; Reed, McClure, Moceri, Thonn & Moriarty*, by *Roy J. Moceri* and *D. Bradley Hudson; Karr, Tuttle, Koch, Campbell, Mawer & Morrow*, by *John F. Kruger (Bernard J. Smolens, Ralph Wellington, Arden J. Olson*, and *Schnader, Harrison, Segal & Lewis*, of counsel); *Sirianni & Youtz*, by *Chris R. Youtz* and *Stephen J. Sirianni (Robert M. Abrahams, Irwin J. Sugarman, Robert E. Bartkus*, and *Schulte, Roth & Zabel*, of counsel); *Williams, Kastner & Gibbs*, by *J. Kenneth McMullin (James J. Hagan, Elizabeth A. York*, and *Simpson, Thacher & Bartlett*, of counsel), for respondents Ebasco Services, Inc., et al.

Riddell, Williams, Bullitt & Walkinshaw, by *John D. Lowery, Hugh R. Tobin*, and *David R. Peeler*, for respondents Small Utilities Group.

Foster, Pepper & Riviera, by *Camden M. Hall, Stellman Keehnel*, and *Daniel L. Thieme; Culp, Dwyer, Guterson & Grader*, by *Robert D. Stewart; Gordon, Thomas, Honeywell, Malanca, Peterson & Daheim*, by *Albert R. Malanca* and *Donald S. Cohen; Harris, Mericle & Orr*, by *Jack G. Orr (Dennis K. Bromley, Robert A. Gordon*, and *Pillsbury, Madison & Sutro*, of counsel), for respondents Utility Defendants.

Lane, Powell, Moss & Miller, by *Larry S. Gangnes, John R. Tomlinson*, and *Paul D. Swanson (Rockne Gill, J. Laurence Cable, Bernard M. Ryan*, and *Schwabe, Williamson, Wyatt, Moore & Roberts; R. Erick Johnson, R. Daniel Lindahl*, and *Bullivant, Houser, Bailey, Hanna, Pendergrass, Hoffman, O'Connel & Goyak; Peter R. Mersereau* and *Rankin, McMurry,*

Vavorsky & Doherty, of counsel), for respondents Oregon Public Entities.

Hillis, Cairncross, Clark & Martin, P.S., by *Michael F. Schumacher* and *Gregory E. Keller*, for respondents Inland Utilities.

Bennett & Bigelow, by *David A. Bennett* and *Elizabeth J. Blagg*, for respondent Dawson.

Jim Jones, Attorney General for the State of Idaho, and *Clive J. Strong, Deputy*, amici curiae.

Brachtenbach, J. — This case involves various bondholders' claims against the Washington Public Power Supply System (Supply System) and others for injuries resulting from the Supply System's default on $2.25 billion in revenue bonds issued to finance construction of two nuclear power generating plants. The trial court dismissed all bondholders' claims for their failure to state a claim for relief pursuant to CR 12(b)(6). We granted direct review and reverse the trial court's judgment on several issues.

Respondent Supply System is a "joint operating agency" and municipal corporation established and authorized by state law to finance, construct, own and operate electrical generating facilities. *See* RCW 43.52.360. Its members are 19 public utility defendants and four cities.

In the early 1970's, the Supply System began construction of three nuclear power generating plants WNP 1, WNP 2 and WNP 3. Those plants were developed in conjunction with a number of participating utilities from several northwestern states, including Washington. The Bonneville Power Administration (BPA), a federal agency, facilitated financing of the first three plants through complex "net-billing" agreements that allocated the risk of noncompletion to the federal agency, combined the costs of the nuclear plants' construction with less costly hydropower, and resulted in an indirect guaranty by BPA. *See Chemical Bank v. WPPSS*, 99 Wn.2d 772, 779, 666 P.2d 329 (1983) (*Chemical Bank* I).

By 1974, it appeared that additional electrical power generation facilities would be needed to meet growing northwest power demands. To meet these demands, the Supply System decided that two additional nuclear power plants WNP 4 and WNP 5, would be necessary. WNP 4 was to be owned entirely by the Supply System; WNP 5 was to be owned 90 percent by the Supply System and 10 percent by Pacific Power and Light Company, a private utility.

In addition to the Supply System and Pacific Power and Light Company, 88 "Participants" were involved in these two projects: 9 Washington cities, 19 Washington public utility districts (PUD's), 1 Washington irrigation district, 7 Oregon cities, 4 Oregon peoples' utility districts, 5 Idaho cities, and 43 rural electric cooperatives, of which 13 are in Washington. The remaining rural electric cooperatives are in Idaho, Montana, Nevada, Oregon and Wyoming. These Participants include 20 of the 23 Supply System members.

The Supply System financed construction of WNP 4 and WNP 5 through the sale of revenue bonds. Changes in federal law, however, precluded use of "net-billing" as a security device as used in the WNP 1, WNP 2 and WNP 3 financing. As a result, in 1976 the Participants all entered into a "Participants' Agreement" with the Supply System. In this agreement, the Supply System promised to sell, and each Participant promised to buy its share of WNP 4 and WNP 5 "Project Capability". Project Capability was defined by the Participants' Agreement as:

> the amounts of electric power and energy, if any, which the Projects are capable of generating at any particular time (including times when either or both of the Plants are not operable or operating or the operation thereof is suspended, interrupted, interfered with, reduced or curtailed, in each case in whole or in part for any reason whatsoever), less Project station use and losses.

Participants' Agreement, section 1(v). In essence, the Participants agreed to pay for their share of Project Capability regardless whether the projects ever produced electricity.

Each Participant agreed to begin monthly payments for its share commencing with the projects' date of completion, or within 1 year of the projects' termination. The Participants' Agreement also established a Participants' committee through which the Participants could disapprove certain actions taken by the Supply System's board of directors.

In 1977, the Supply System adopted bond resolution 890, a trust indenture which provided for its issuance of a series of revenue bonds to finance the WNP 4 and WNP 5 plants. Resolution 890 appointed a bond trustee, Chemical Bank, to represent the bondholders' interests. Resolution 890 required the Supply System to collect charges for Project Capability from the Participants as agreed in the Participants' Agreement so as to provide for payment of interest due on the revenue bonds issued. The effect of the Participants' Agreement together with resolution 890 was that the Participants indirectly guaranteed debt service on all the bonds issued by promising to purchase their shares of Project Capability once the projects were completed, or within 1 year of termination of construction.

Financing for the plants involved the capitalization of interest on a series of bonds. Under this arrangement, the Supply System would use future bond sales revenue to pay interest due on outstanding bonds until the completion of WNP 4 and WNP 5, when the operating revenues would then pay the debt service on the final series of bonds. Construction of WNP 4 and WNP 5 was originally projected to require $3.4 billion.

The Supply System, along with its investment advisors, prepared Official Statements to accompany the WNP 4 and WNP 5 bond offerings. These Official Statements contained opinions from engineers and accountants as to the structural and financial feasibility of the plants. Additionally, the Official Statements explained that the Participants were obligated to pay the costs of the plants, including debt service on the bonds, whether or not the plants ever were completed or generating power. The WNP 4 and WNP 5 bonds on their faces referred to resolution 890 and the Participants' guaranties to purchase Project Capability.

The Supply System sold the bonds through a 15-part integrated offering beginning in February 1977. All bonds were sold directly to underwriters pursuant to bidding procedures in RCW 43.52.343. These underwriters then resold the bonds to investors.

WNP 4 was projected to be operational by March 1982; WNP 5 by April 1984. Presumably, the final series of bonds would have been issued so as to coincide with these dates, allowing the operating revenues to pay the debt service obligations on the final series of bonds as originally planned. On May 29, 1981, however, the Supply System announced that because it was not able to obtain bond financing for its nuclear power projects for the following year, and because northwest power demands had not grown as anticipated, it was terminating WNP 4 and WNP 5. The Supply System formally withdrew the 15th bond offering, and announced that the cost estimates contained in the Official Statements issued with the last series of bonds on May 17, 1981, had been understated by approximately $5 billion. Final estimates of completion costs for WNP 4 and WNP 5 had also grown from the original $3.4 billion to nearly $12 billion. On January 22, 1982, the Supply System's board of directors unanimously voted to terminate WNP 4 and WNP 5 due to conditions beyond its ability to control. By that time, bonds outstanding had an aggregate face value of approximately $2.25 billion.

The Supply System's termination of the projects established a trigger date for various debt service payments, which by virtue of the Participants' Agreement and resolution 890, became the Participants' obligations. The estimated amount necessary to service the outstanding bonds is $7 billion.

Chemical Bank, on behalf of the WNP 4 and WNP 5 bondholders, filed a declaratory action to determine the enforceability of the Participants' Agreement. This court determined that all Washington Participants lacked statutory authority to enter into the Participants' Agreement, and declared the Agreement void and unenforceable. *See Chemical Bank* I, at 799. Moreover, this court held that the remaining Participants were released from their obligations under the

Participants' Agreement on the basis of commercial frustration or impossibility, and mutual mistake. *See Chemical Bank v. WPPSS*, 102 Wn.2d 874, 888-89, 691 P.2d 524 (1984) (*Chemical Bank II*), *cert. denied*, 471 U.S. 1065, 1075 (1985).

This court denied plaintiffs Fredric Haberman and five others' motion to intervene in *Chemical Bank* II. Subsequently, on May 7, 1984, Haberman and other individual bondholders (plaintiffs) instituted this suit against the Supply System and others for numerous causes of action arising out of the WNP 4 and WNP 5 termination and resulting bond default. A group of institutional bondholders, including American Express Travel Related Services Company, Inc. (Amexco) and United States Trust Company of New York, joined the action as intervenor-plaintiffs (intervenors).

Five basic groups were named as defendants and are respondents on this appeal: the Supply System, the 23 members of the Supply System, Chemical Bank, the 88 WNP 4 and WNP 5 "Participants", and the professionals who rendered services to the Supply System. The respondent professionals include accountants Ernst & Whinney; investment advisors Blyth, Eastman, Paine, Webber, Inc., and its officers Donald Patterson and Stanley Pardo; engineers R. W. Beck and Associates, United Engineers and Constructors, Inc., and Ebasco Services, Inc.; attorneys Wood & Dawson, and Houghton, Cluck, Coughlin & Riley; and other unnamed professionals.

Plaintiffs' and intervenors' complaints allege that all defendants knew or should have known: that the market could not support the extensive bond sales required to finance WNP 4 and WNP 5, and that the financing plan was otherwise insufficient; that the Participants' Agreement was unenforceable or that a declaratory judgment test case should have been filed to determine its enforceability before the bond issues; that all professionals performed their jobs negligently and rendered inaccurate information to the Supply System; and that predictions of the need for power made by the BPA were inaccurate. Several of plaintiffs' counts were not addressed by the trial court and were not briefed on this appeal.

The complaints reveal several bases upon which these actions are brought: aid in preparation of the Official Statements, which contained misstatements and material omissions; making negligent or fraudulent recommendations regarding need, cost, and feasibility to the Supply System that were placed in the Official Statements and Annual Reports, and were relied upon by the Supply System, bond rating agencies, government agencies, plaintiffs and intervenors; participation in the Supply System board of directors meetings and Participants' committee meetings; and omissions and misstatements regarding the enforceability of the Participants' Agreement.

Both plaintiffs and intervenors alleged violations of The Securities Act of Washington (WSSA), RCW 21.20, and asserted derivative negligent misrepresentation claims. The intervenors also alleged common law negligent misrepresentation, fraud, and violations of the Consumer Protection Act. Plaintiffs also alleged violations of the federal Securities Act of 1933, sought to add new plaintiffs and defendants, and to overturn the trial court ruling that service on Patterson and Pardo was defective.

The trial court dismissed all plaintiffs' and intervenors' claims pursuant to CR 12(b)(6) (failure to state a claim upon which relief may be granted). Plaintiffs and intervenors appealed; we accepted direct review.

I

The Standard of Review

[1] A trial court may grant dismissal for failure to state a claim under CR 12(b)(6) only if " 'it appears beyond doubt that the plaintiff can prove no set of facts, consistent with the complaint, which would entitle the plaintiff to relief.' " *Bowman v. John Doe*, 104 Wn.2d 181, 183, 704 P.2d 140 (1985); *Orwick v. Seattle*, 103 Wn.2d 249, 254, 692 P.2d 793 (1984). CR 12(b)(6) motions should be granted "sparingly and with care", *Orwick*, at 254.

A plaintiff's factual allegations are presumed true for purposes of a CR 12(b)(6) motion. *Lawson v. State,* 107 Wn.2d 444, 448, 730 P.2d 1308 (1986); *Bowman,* at 183. A complaint survives a CR 12(b)(6) motion if any state of facts could exist under which the court could sustain the claim for relief. *Lawson,* at 448; *Bowman,* at 183; *Orwick,* at 255. Thus, a court may consider hypothetical facts not part of the formal record in deciding whether to dismiss a complaint pursuant to CR 12(b)(6). *Halverson v. Dahl,* 89 Wn.2d 673, 675, 574 P.2d 1190 (1978).

CR 12(b)(6), read together with CR 8(a)(1), requires the court to decide whether the allegations in a complaint constitute a short and plain statement of the claim showing that the pleader is entitled to relief. *Orwick,* at 254. The court need not accept legal conclusions as correct. *See Orwick,* at 254; *State ex rel. Pirak v. Schoettler,* 45 Wn.2d 367, 370, 274 P.2d 852 (1954). When an area of the law involved is in the process of development, courts are reluctant to dismiss an action on the pleadings alone by way of a CR 12(b)(6) motion. 3A L. Orland, Wash. Prac. § 5152 (3d ed. 1980).

Notwithstanding the trial court's characterization of its dismissal as pursuant to CR 12(b)(6), respondents argue that because the court considered materials outside the complaint in reaching its decision, the dismissal should have been pursuant to CR 56 (summary judgment). *See* CR 12(b). (CR 12(b)(6) motion is converted into CR 56 summary judgment motion whenever matters outside the pleadings are presented to and accepted by the court.)

[2] While the submission and consolidation of extraneous materials by either party normally converts a CR 12(b)(6) motion to one for summary judgment, if the court can say that no matter what facts are proven within the context of the claim, the plaintiffs would not be entitled to relief, the motion remains one under CR 12(b)(6). *See Loger v. Washington Timber Prods., Inc.,* 8 Wn. App. 921, 924, 509 P.2d 1009, *review denied,* 82 Wn.2d 1011 (1973). In such a case, the presentation of extraneous evidence would be immaterial. *Loger,* at 924. In *Loger,* the trial judge considered matters outside the pleadings

to enable him to understand the context of the CR 12 motion so as to rule on it as a matter of law, without reaching or resolving any factual dispute. *Loger,* at 926.

Plaintiffs and intervenors also argue that the trial court made factual findings. These purported findings were, however, determinations of law based upon the facts alleged in the complaint. We find that although the trial court considered matters extraneous to the complaints, it ruled as a matter of law that plaintiffs and intervenors had not stated a claim and did not make any determination of facts in dispute. We conclude that the proper standard of review remains that required by CR 12(b)(6). We therefore proceed to the remaining issues with this standard of review in mind.

II

RES JUDICATA CLAIMS

Respondents argue that the doctrine of res judicata bars plaintiffs' and intervenors' claims. We disagree. This cour previously determined that the Participants were not liable to repay principal and interest on WNP 4 and WNP 5 bonds because their obligations to do so were ultra vires acts, or unenforceable because of commercial frustration, impossibility, and mutual mistake. *See Chemical Bank I; Chemical Bank II.*

[3] Res judicata prevents relitigation of claims already decided. *Meder v. CCME Corp.,* 7 Wn. App. 801, 803, 502 P.2d 1252 (1972), *review denied,* 81 Wn.2d 1011 (1973). While res judicata bars relitigation of claims necessarily a part of a previous matter in controversy, it poses no bar to claims not in fact adjudicated previously. *Seattle-First Nat'l Bank v. Kawachi,* 91 Wn.2d 223, 226, 588 P.2d 725 (1978).

The prior *Chemical Bank* litigation dealt solely with contract claims between the Supply System and the Participants. No securities, consumer protection, or common law tort claims were at issue. A motion brought by plaintiffs to intervene in the *Chemical Bank* cases was denied as untimely. *See Chemical Bank II,* at 889. We conclude that res judicata does not bar the claims before this court.

III

Federal Securities Act Claims

Plaintiffs argue that the trial court improperly dismissed their federal securities claims. Section 12(2) of the federal Securities Act of 1933, 15 U.S.C. § 77*l*(2), provides a cause of action against any person who "offers or sells a security" through a prospectus containing misrepresentations or omissions. Section 3(a)(2) of the act exempts from section 12 any security issued by a public instrumentality. 15 U.S.C. § 77c(a)(2) (1981). While plaintiffs acknowledge that the WNP 4 and WNP 5 bonds are exempt from section 12, they claim that the Participants' guaranties of those bonds constitute separate securities that are subject to section 12 liability. Plaintiffs contend that whether the guaranties were separate securities was a factual question improperly decided by the trial court on a motion to dismiss.

First, we note that federal courts consistently determine as a matter of law whether investment schemes are securities. *See, e.g., Black v. Payne,* 591 F.2d 83, 86 n.1, 88 (9th Cir.) (affirming Fed. R. Civ. P. 12(b)(6) dismissal because no security involved), *cert. denied,* 444 U.S. 867 (1979); *De Luz Ranchos Inv. Ltd. v. Coldwell Banker & Co.,* 608 F.2d 1297, 1299-1301 (9th Cir. 1979) (question of law whether investment scheme constituted a security); *Mason v. Unkeless,* 618 F.2d 597, 598 (9th Cir. 1980) (dismissal for failure to show a security was involved proper on Fed. R. Civ. P. 12(b)(6) motion); *Frederikson v. Poloway,* 637 F.2d 1147, 1153-54 (7th Cir.), *cert. denied,* 451 U.S. 1017 (1981) (dismissal because no security involved); *Ahrens v. American-Canadian Beaver Co.,* 428 F.2d 926, 928 (10th Cir. 1970) (question of law whether contracts were securities).

[4] Next, we agree with the trial court's conculsion that the Participants' guaranties were not separate securities. A similar argument was rejected in *Woods v. Homes & Structures of Pittsburg, Kan., Inc.,* 489 F. Supp. 1270 (D. Kan. 1980). There, municipal bond purchasers sought to avoid the section 3(a)(2) exemption by arguing that certain insurance company guaranties attached to the bonds as certificates were separate

securities subject to section 12(2). *Woods,* at 1292-94. The court noted that the guaranties had not been sold, nor could they have been purchased separately from the bonds. *Woods,* at 1293. The court concluded that the presence of the guaranties did not destroy the exemption created by the Securities Act of 1933 because the bonds were exempt and because the guaranties were part of those bonds. *Woods,* at 1293. *See also Johns Hopkins Univ. v. Hutton,* 422 F.2d 1124, 1128 (4th Cir. 1970).

Here, no separate Participants' guaranty existed. The Participants "guaranteed" only that they would purchase their share of WNP 4 and WNP 5 Project Capability whether or not power was produced. This obligation was an indirect guaranty of the bonds only by virtue of resolution 890, which empowered the Supply System to collect the amounts owed by the Participants pursuant to the Participants' Agreement to pay debt service to the bonds issued. The Participants did not guarantee payment on the bonds directly. The guaranties were neither sold, nor marketed, and could not have been purchased apart from the bonds. We conclude that the guaranties were not separate securities.

Finally, plaintiffs argue that our ruling in *Chemical Bank I,* voiding the Participants' guaranties as ultra vires, converted them into separate, nonexempt securities. This contention is without merit. Our *Chemical Bank* I and II decisions did not hold the guaranties nonexistent; rather we held the guaranties unenforceable. Even if we assume that the guaranties were somehow "converted" into separate securities, such securities remain exempt from section 12(2) liability because the Participants are all public instrumentalities within the meaning of section 3(a)(2) of the Securities Act of 1933. The trial court's dismissal of plaintiffs' Securities Act of 1933 claims is affirmed.

IV

Securities Act of Washington

Plaintiffs and intervenors allege that all respondents made material misrepresentations and omissions in connection with the bond sales in violation of the Securities Act of Washington (WSSA). They sought recovery pursuant to the civil liability provisions of RCW 21.20.430(1), (3). The trial court dismissed all WSSA claims, holding as a matter of law that no respondent was a seller under RCW 21.20.430(1); that no respondent controlled a seller within the meaning of RCW 21.20.430(3); and that RCW 21.20.430(7) barred negligence claims against all respondents except bond counsel Wood & Dawson because it requires proof of scienter.

A

Seller Claims Under RCW 21.20.430(1)

Plaintiffs and intervenors seek recovery under RCW 21.20.430(1) which provides that:

> *Any person, who offers or sells a security in violation of any provisions of RCW 21.20.010* or 21.20.140 through 21.20.230, *is liable to the person buying the security from him or her,* who may sue either at law or in equity to recover the consideration paid for the security, together with interest at eight percent per annum from the date of payment, costs, and reasonable attorneys' fees, less the amount of any income received on the security, upon the tender of the security, or for damages if he or she no longer owns the security. Damages are the amount that would be recoverable upon a tender less (a) the value of the security when the buyer disposed of it and (b) interest at eight percent per annum from the date of disposition.

(Italics ours.) Plaintiffs and intervenors allege that respondents violated RCW 21.20.010(2) and (3) by making material misrepresentations, or omitting necessary facts to make statements not misleading, in the Official Statements and Annual Reports.

Plaintiffs and intervenors contend that the trial court erred in concluding that RCW 21.20.430(1) imposes liability only on the literal seller of a security who passes title directly to the plaintiff. Instead, plaintiffs and intervenors argue that RCW 21.20.430(1), like its federal counterpart from which it was derived, section 12(2) of the Securities Act of 1933, 15 U.S.C. § 77*l*(2), imposes liability on those persons who are a substantial factor in a sale of securities.

[5] Washington's securities fraud laws are modeled after the Uniform Securities Act. RCW 21.20.430 parallels section 410 of the Uniform Securities Act, which in turn is modeled after section 12(2) of the federal Securities Act of 1933. *See* Comment, Uniform Securities Act § 410, 7B U.L.A. 644 (1985); L. Loss, *Commentary on the Uniform Securities Act* 147-48 (1976). Our Legislature provided that the WSSA

> shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it and to coordinate the interpretation and administration of this chapter with the related federal regulation.

RCW 21.20.900. We have interpreted this provision to require harmony but not exact parallelism with other states' and federal law. *Kittilson v. Ford*, 93 Wn.2d 223, 227, 608 P.2d 264 (1980); *see Clausing v. DeHart*, 83 Wn.2d 70, 72-73, 515 P.2d 982 (1973) (applying federal analysis of Securities Exchange Act of 1934 to RCW 21.20.010). We note that while the purpose of federal securities laws is to maintain the integrity of the secondary securities markets and to enforce disclosure, the WSSA is intended to protect investors. Comment, *Securities Fraud Under the Blue Sky of Washington*, 53 Wash. L. Rev. 279, 282 n.10 (1978); Rooks, *The Blue Sky of Washington: Registration of Securities of a New Venture*, 6 Gonz. L. Rev. 187, 188 (1971). To this end, this court has construed by WSSA broadly. *See McClellan v. Sundholm*, 89 Wn.2d 527, 533, 574 P.2d 371 (1978).

At least two Washington Court of Appeals decisions have interpreted the WSSA to impose liability upon persons rendering assistance in preparation of an unlawful sale of securities in violation of RCW 21.20.010. *See Golberg v. Sanglier*, 27 Wn.

App. 179, 193, 616 P.2d 1239 (1980) (relying on *Kaas v. Privette*, 12 Wn. App. 142, 151, 529 P.2d 23 (1974)), *rev'd on other grounds*, 96 Wn.2d 874, 639 P.2d 1347, 647 P.2d 489 (1981). However, both decisions apparently presumed that liability attached pursuant to RCW 21.20.010 without determining civil liability under RCW 21.20.430(1).

In *McClellan v. Sundholm, supra* at 534, the court held a salesman liable under RCW 21.20.430(1) as a seller although the purchase agreement was between the buyer and the salesman's employer. Without discussing the absence of privity, the court found that because the salesman's actions constituted an "offer" of a security, his disposition of the security through the purchase agreement constituted a sale. *McClellan*, at 534.

Thus, although we have interpreted the offer and sell language in RCW 21.20.430(1) to be broad enough to include face to face "dispositions" of securities where privity is absent, we have not yet decided the scope of liability where privity is lacking.

An examination of federal court decisions interpreting section 12(2) of the Securities Act of 1933, 15 U.S.C. § 77*l*(2) shows that only two circuits require privity between a plaintiff-purchaser and defendant-seller. *See, e.g., Collins v. Signetics Corp.*, 605 F.2d 110, 113-14 (3d Cir. 1979); *Sanders v. John Nuveen & Co.*, 619 F.2d 1222, 1226 (7th Cir. 1980), *cert. denied*, 450 U.S. 1005 (1981). This approach emphasizes the statutory language of section 12(2) in light of the Supreme Court's strict construction in securities cases not involving section 12(2). *See, e.g., Touche Ross & Co. v. Redington*, 442 U.S. 560, 578, 61 L. Ed. 2d 82, 99 S. Ct. 2479 (1979) (generalized references to the remedial purposes of The Securities Exchange Act of 1934 do not justify reading a provision more broadly than its language and the statutory scheme reasonably permit). In *Collins*, for example, the court concluded that a broad interpretation of section 12(2) would be contrary to its plain meaning and frustrate the overall statutory scheme where Congress had already provided a specific remedy for the purchaser against the defendant issuer of the securities in section 11 of the Securities Act of 1933, *Collins*, at 113.

The majority of the federal circuits, however, have construed the term seller to include those whose participation in the sale was a substantial factor in causing the transaction to take place. *See, e.g., Lawler v. Gilliam,* 569 F.2d 1283, 1287 (4th Cir. 1978); *Pharo v. Smith,* 621 F.2d 656, 665-67 (5th Cir. 1980), *rev'd in part on other grounds on rehearing,* 625 F.2d 1226 (5th Cir. 1980); *Davis v. AVCO Fin. Servs.,* 739 F.2d 1057, 1063-68 (6th Cir. 1984), *cert. denied,* 470 U.S. 1005, 472 U.S. 1012 (1985); *Stokes v. Lokken,* 644 F.2d 779, 785 (8th Cir. 1981); *Anderson v. Aurotek,* 774 F.2d 927, 930 (9th Cir. 1985); *SEC v. Murphy,* 626 F.2d 633, 650 (9th Cir. 1980); *Foster v. Jesup & Lamont Sec. Co.,* 759 F.2d 838, 843-44 (11th Cir. 1985), *aff'd,* 782 F.2d 901 (11th Cir. 1986); *see also In re Wicat Sec. Litig.,* 600 F. Supp. 1236, 1239, 1242 (D. Utah 1984) (although question of whether strict privity required not yet decided by Tenth Circuit, heavy weight of authority suggests substantial factor approach); *Cady v. Murphy,* 113 F.2d 988, 990 (1st Cir.), *cert. denied,* 311 U.S. 705 (1940) (broker who acted as agent for seller could be liable under section 12(2)).

The Supreme Court has not yet addressed this issue, but has most recently emphasized the cumulative remedial purpose of the securities laws is not to be ignored in their interpretation. *See Herman & MacLean v. Huddleston,* 459 U.S. 375, 386-87, 74 L. Ed. 2d 548, 103 S. Ct. 683 (1983); *see also Davis,* 739 F.2d at 1064 (Supreme Court has called for flexible yet literal interpretation of the securities acts).

This substantial factor-proximate cause approach originated in *Lennerth v. Mendenhall,* 234 F. Supp. 59, 65 (N.D. Ohio 1964), where the court stated:

> [L]iability must lie somewhere between the narrow view, which holds only the parties to the sale, and the too-liberal view which would hold all who remotely participated in the events leading up to the transaction. We think that the line of demarcation must be drawn in terms of cause and effect: To borrow a phrase from the law of negligence, did the injury to the plaintiff flow directly and proximately from the actions of this particular defendant? If the answer is in the affirmative, we would hold him liable. But for the

> presence of the defendant . . . in the negotiations preceding the sale, could the sale have been consummated? If the answer is in the negative, and we find that the transaction could never have materialized without the efforts of that defendant, we must find him guilty.
> . . . The hunter who seduces the prey and leads it to the trap he has set is no less guilty than the hunter whose hand springs the snare. We find that the activity of the corporate defendant's agent . . . is tantamount to that of a "seller" within the liberal remedial spirit of the securities laws.

The *Lennerth* court's proximate cause theory has been refined to the present substantial factor-proximate cause in subsequent cases. *Davis*, at 1066-67.

The *Davis* court concluded that a substantial factor test "constitutes an appropriate synthesis of the sometimes antithetical policies that the securites laws are to be construed as statutes while, at the same time, giving effect to their far-reaching remedial purpose." *Davis*, at 1067. Indeed, as noted by one commentator, a strict privity requirement applied to a firm commitment underwriting agreement, where underwriters buy the securities from the corporation without recourse if they cannot sell the entire block of shares, would allow a cause of action only against the underwriter, even where the corporation was the issuer raising capital through the sale. Note, *Seller Liability Under Section 12(2) of the Securities Act of 1933: A Proximate Cause Substantial Factor Approach Limited by a Duty of Inquiry*, 36 Vand. L. Rev. 361, 389-90 (1983). Such a result could not have been intended by Congress and should not be allowed to defeat the remedial purposes of the securities laws. Note, 36 Vand. L. Rev., at 389-90.

A review of other states' decisions as to the scope of "seller" under their securities laws is inconclusive. The Oklahoma Supreme Court refused to construe language in its statute similar to that in RCW 21.20.430(1) to include participants in the securities transaction. *Nikkel v. Stifel, Nicolaus & Co.*, 542 P.2d 1305, 1307 (Okla. 1975). On the other hand, the Minnesota Court of Appeals has adopted a substantial factor test to determine seller liability under its securities act based on section 410 of the Uniform Securities Act and section 12(2).

Anders v. Dakota Land & Dev. Co., 380 N.W.2d 862 (Minn. Ct. App. 1986). This court's research disclosed no other state court decisions construing state securities laws similar to RCW 21.20.430(1).

Although other federal courts have construed similar state securities statutes, the decisions do not reflect state court analysis. They instead reflect a federal analysis of section 12(2) as applied to the state law in question. Moreover, the analysis applied by federal trial courts in these cases is usually that of their respective federal circuits. *See, e.g., Dahl v. Pinter*, 787 F.2d 985, 991 (5th Cir. 1986) (Texas test for seller liability substantially similar to Fifth Circuit substantial factor test), *cert. granted*, ___ U.S. ___, 95 L. Ed. 2d 493, 107 S. Ct. 1885 (1987); *Huddleston v. Herman & MacLean*, 640 F.2d 534, 550-51 (5th Cir. 1981) (interpreting Texas Securities Act to impose liability on persons constituting a substantial factor in sale, noting that Texas statutory comments referred to section 12(2) as model for state act and noting that the Fifth Circuit uses substantial factor test), *rev'd on other grounds*, 459 U.S. 375 (1983); *see also Anderson v. Aurotek*, 774 F.2d at 929 n.1 (assuming that Washington securities statute interpreted in same manner as section 12(2), finding substantial factor liability); *SEC v. Seaboard Corp.*, 677 F.2d 1289, 1295 (9th Cir. 1982) (California requires direct privity, no California precedent); *In re Victor Technologies Sec. Litig.*, Blue Sky L. Rep. (CCH) ¶ 72,491, (N.D. Cal. 1987) (relying on *In re Diasonics Sec. Litig.*, 599 F. Supp. 447, 459 (N.D. Cal. 1984) (finding that California Securities Act requires Privity)); *In re Catanella & E.F. Hutton & Co. Sec. Litig.*, 583 F. Supp. 1388, 1440 (E.D. Pa. 1984) (Pennsylvania securities statute privity requirement likened to that found in section 12(2)); *Ging v. Parker-Hunter, Inc.*, 544 F. Supp. 49, 52 (W.D. Pa. 1982) (determining that Pennsylvania Securities Act requires strict privity, no Pennsylvania precedent). In any event, federal law does not preempt or control state securities acts. *See* Securities Act of 1933, § 18, 15 U.S.C. § 77r.

[6] We conclude that the substantial factor-proximate cause definition of seller prevailing in the federal circuits

provides the best guidance for our analysis of seller liability under RCW 21.20.430(1). We note that our conclusion is in accord with the views expressed in the official comments to the recently revised Uniform Securities Act of 1985. Although not adopted in Washington, new section 605(a) of the Uniform Securities Act contains the language of old section 410 upon which RCW 21.20.430(1) was based. The official comments to section 605(a) state that under this section, "liability may be imposed on a person in addition to the immediate seller if the person's participation was a substantial contributive factor in the violation." Uniform Securities Act, § 605 comment, 7B U.L.A. 81 (Supp. 1987) (citing *Davis*, 739 F.2d at 1057). We believe this approach best promotes the legislative purpose behind the WSSA, while harmonizing our statutory scheme with federal and other state decisions. We also believe this definition is in harmony with similar developments in general tort law. *Davis*, at 1066.

The Ninth Circuit has described its substantial factor-proximate cause analysis as follows:

> In assessing proximate cause, courts focus first on whether a defendant's acts were the *actual cause* of the injury, *i.e.*, whether 'but for' the defendant's conduct, there would have been no sale. *Nicewarner v. Bleavins, supra*, 244 F. Supp. [261] at 266 (D.Colo.1965); *see Hill York Corp. v. American International Franchises, Inc.*, 448 F.2d [680, 693 (5th Cir. 1971)]; *Lennerth v. Mendenhall, supra*, 234 F.Supp. at 65. A finding of "but for" causation, alone, does not satisfy proximate cause, however. *See Nicewarner v. Bleavins, supra*, 244 F.Supp. at 266; R. Jennings & H. Marsh, Securities Regulation 1096 (4th ed. 1977); W. Prosser, Handbook of the Law of Torts 238-39, 244 (4th ed. 1971). Prior to the issuance of a security, numerous persons perform mechanical acts without which there could be no sale. For example, a printer may prepare key documents or a bank may advance cash to a customer upon the customer's presentation of an instrument and then pass the instrument to another person. Both would satisfy a "but for" causation test, but these acts nonetheless do not render the defendants sellers. *See First Trust &*

Savings Bank v. Fidelity-Philadelphia Trust Co., 214 F.2d 320 (3d Cir. 1954); Ruder, Multiple Defendants in Securities Law Fraud Cases, 120 U.Pa.L.Rev. 597, 646 (1972). Before a person's acts can be considered the proximate cause of a sale, his acts must also be a substantial factor in bringing about the transaction. *Lewis v. Walston & Co., Inc.*, 487 F.2d 617, 621-22 (5th Cir. 1973). *See* Restatement (Second) of Torts § 431 (1965).

SEC v. Murphy, 626 F.2d 633, 650 (9th Cir. 1980).

In a similar fashion, we hold that a defendant is liable as a seller under RCW 21.20.430(1) if his acts were a substantial contributive factor in the sales transaction. Considerations important in determining whether a defendant's conduct is a substantial contributive factor in the sales transaction include: (1) the number of other factors which contribute to the sale and the extent of the effect which they have in producing it; (2) whether the defendant's conduct has created a force or series of forces which are in continous and active operation up to the time of the sale, or has created a situation harmless unless acted upon by other forces for which the actor is not responsible; and (3) lapse of time. *See generally* Restatement (Second of Torts §§ 432, 433 (1977). Whether a defendant's conduct was a substantial contributive factor is necessarily a question of fact.

We emphasize that our adoption of a substantial contributive factor test to determine seller liability under RCW 21.20.430(1) is distinct from the test for participant liability pursuant to RCW 21.20.430(3). Our substantial contributive factor analysis simply expands the strict privity approach to sellers so as to include those parties who have the attributes of a seller and thus who policy dictates should be subject to liability under RCW 21.20.430(1), but who would escape primary liability for want of privity.

Here, for example, the Supply System sold all the bonds to underwriters who then sold them to plaintiffs and intervenors. If we were to require strict privity for liability under RCW 21.20.430(1), only the underwriters would be potentially liable for prospectus fraud, cutting off all potential claims against the

issuer of the bonds and others acting together with the issuer who were the actual beneficiaries of the sale proceeds. The result allows issuers of securities to insulate themselves from liability to ultimate purchasers simply by selling to middlemen beyond their control, even in situations where they know that the securities will be resold immediately to buyers who will rely on Official Statements and Annual Reports written by the issuer to facilitate the sales. Unlike the federal Securities Act of 1933, § 11, the WSSA does not provide for separate issuer liability. Thus, if privity were required for liability under RCW 21.20.403(1), an issuer in a firm commitment underwriting would never be liable, regardless of its culpability. We find such a result contrary to the clear purposes of the WSSA.

RCW 21.20.430(1) liability remains based on a defendant's status as seller. RCW 21.20.430(3) liability is based on other defendants' relationships to a seller liable under RCW 21.20.430(1). Therefore, respondents' argument that a substantial contributive factor approach to seller in RCW 21.20.430(1) would render RCW 21.20.430(3) meaningless is without merit. Although some secondarily liable parties under RCW 21.20.430(3) may also be liable as sellers under RCW 21.20.430(1), clearly not all secondarily liable parties are sellers under the substantial contributive factor test. Thus, as contemplated by the statutory scheme, participants who are involved in a securities sale, but who are not substantial contributive factors, may be subject to secondary liability under RCW 21.20.430(3).

We therefore reverse the trial court's dismissal of plaintiffs' and intervenors' securities claims under RCW 21.20.430(1).

B

Secondary Liability Claims Under RCW 21.20.430(3)

Our conclusion that seller liability pursuant to RCW 21.20.430(1) is to be determined through a substantial contributive factor analysis necessarily requires us to reverse the trial court's dismissal of plaintiffs' and intervenors' secondary liability claims pursuant to RCW 21.20.430(3). Because secondary liability under RCW 21.20.430(3) would be based on a party's

relationship to a seller of securities, the sufficiency of plaintiffs' and intervenors' allegations of secondary liability can only be determined after the sellers are identified. We also reverse the trial court's determination that respondent nonmember Participants are not secondarily liable because they did not control the Supply System. For purposes of our CR 12(b)(6) standard of review, it is conceivable that nonmember Participants may be secondarily liable because of their relationship to a party other than the Supply System. We cannot say, without a determination of all sellers potentially liable under RCW 21.20.430(1), that these respondents did not control any seller.

C

Implied Remedy Under RCW 21.20.010

In the alternative, intervenors argue that RCW 21.20.010 provides an implied remedy to fill any liability gap created by a strict privity requirement under RCW 21.20.430(1). Because we find that RCW 21.20.430(1) provides an express remedy available to intervenors, we need not address the issue.

D

Extraterritorial Application of the WSSA

Respondent Small Utilities Group contends that the trial court's dismissal of plaintiffs' and intervenors' WSSA claims should be upheld because the WSSA should not be applied extraterritorially to out-of-state defendants or transactions. Small Utilities Group also contends that extraterritorial application of the WSSA would violate the commerce clause. We disagree with both contentions.

[7] Initially, we note that this issue involves the choice of law to be applied in this case rather than whether the WSSA can be applied extraterritorially to regulate out-of-state transactions. Here, we are not concerned with the application of the WSSA within another state's jurisdiction. Instead, the question before us is whether the WSSA applies in an action brought in a

Washington forum where out-of-state parties are under this State's jurisdiction. As a result, choice of law principles govern our analysis.

This court employees a "most significant relationship" standard to determine what law governs in a contracts or torts case. *Southwell v. Widing Transp., Inc.*, 101 Wn.2d 200, 204, 676 P.2d 477 (1984); *Johnson v. Spider Staging Corp.*, 87 Wn.2d 577, 580, 555 P.2d 997 (1976). This standard requires a court to evaluate the contacts of the interested jurisdictions with respect to the claims at issue and the interests and policies of those jurisdictions. *Southwell,* at 204.

Here, Washington is clearly the state with the most substantial contacts with the subject matter of this case. The bonds at issue were issued by the Supply System to finance two nuclear power plants in Washington. The Supply System, respondent members and directors, one respondent bond counsel, as well as the majority of the respondent Participants are Washington residents. All respondents had substantial business dealings in Washington, and the Official Statements and Annual Reports allegedly containing misrepresentations emanated from this state. No party contends that another state's securities act applies. Moreover, Washington State has an interest in regulating the conduct of parties involved in the sale of bonds issued by a municipal corporation, the Supply System, to finance construction of in-state power generating facilities. We conclude that the contacts of the parties involved, the claims at issue, and the interests of this State dictate our application of the WSSA to this case.

Nevertheless, Small Utilities Group contends that our application of the WSSA would violate the commerce clause. Their argument is based on *Edgar v. MITE Corp.*, 457 U.S. 624, 641, 73 L. Ed. 2d 269, 102 S. Ct. 2629 (1982). *Edgar* involved a commerce clause challenge to an Illinois statute regulating corporate takeovers in a multistate context. The statute could be applied to regulate tender offers not affecting Illinois shareholders. *Edgar,* at 642. The Court found that the burden on interstate commerce posed by the statute was not counterbalanced by local interests, and that the statute upset

the balance struck by Congress between corporate management and takeover bidders in its regulation of interstate tender offers. *Edgar*, at 643-46. The Court noted that an impermissible conflict between federal and state regulation of commerce exists where compliance with both federal and state regulations is physically impossible, or where state law interferes with the accomplishment and execution of congressional purposes and objectives. *Edgar*, at 631.

[8] Here, our application of the WSSA does not impinge on federal regulation of commerce as did the Illinois anti-takeover statute under scrutiny in *Edgar*. First, our application of the WSSA to this case is based on the substantial relationship between the subject matter, the parties, and the forum state. Unlike the Illinois statute in *Edgar*, we do not attempt to apply the WSSA to transactions completely unrelated to Washington. Moreover, in contrast to the corporate takeover regulations at issue in *Edgar*, Congress explicitly provided that federal and state securities regulation may co-exist absent conflict. *See* 15 U.S.C. §§ 77r, 78bb(a) (1981). The WSSA is intended to be coordinated with related federal regulation. RCW 21.20.900. Our application of the WSSA in this case in no way affects the federal regulatory scheme enacted by Congress to regulate interstate securities transactions. Finally the impact of our application of the WSSA on interstate commerce does not rise to the level of an impermissible burden like that found in *Edgar*.

> Not every exercise of state power with some impact on interstate commerce is invalid. A state statute must be upheld if it "regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental . . . unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."

Edgar, at 640, citing *Pike v. Bruce Church, Inc.*, 397 U.S. 137 142, 25 L. Ed. 2d 174, 90 S. Ct. 844 (1970).

Washington's interests in regulating bond issues by municipal corporations, and in providing a forum for claims arising from those issues outweigh the impact that our application of

the WSSA in this case will have on interstate commerce, particularly when considering the substantial relationship between this state and the case in controversy. *See In re WPPSS Sec. Litig.*, [new matters] Blue Sky L. Rep. (CCH) ¶ 72,371, 71,683 (W.D. Wash. 1986); Lewis v. Berry, No. C82-1244VR (W.D. Wash. May 24, 1985) (WSSA antifraud provision does not burden interstate commerce; it is clearly justified by the local interests served). Thus, we find no violation of the commerce clause. The WSSA may be properly applied to this case.

E

Scienter Amendment Claims

The trial court held that RCW 21.20.430(7) applied retroactively to bar plaintiffs' and intervenors' WSSA claims. Plaintiffs and intervenors, together with respondent/cross-appellant Wood & Dawson, challenge RCW 21.20.430(7) on several constitutional grounds.

As amended in 1985, RCW 21.20.430(7) provides that:

> Notwithstanding subsections (1) through (6) of this section, if an initial offer or sale of securities that are exempt from registration under RCW 21.20.310 *is made by this state or its agencies,* political subdivisions, municipal or quasi-municipal corporations, or other instrumentality of one or more of the foregoing and is in violation of RCW 21.20.010(2), and any such issuer, member of the governing body, committee member, public officer, director, employee, or agent of such issuer acting on its behalf, or person in control of such issuer, member of the governing body, committee member, public officer, director, employee, or agent of such person acting on its behalf, materially aids in the offer or sale, such person is liable to the purchaser of the security *only if the purchaser establishes scienter on the part of the defendant.* The word "employee" or the word "agent," as such words are used in this subsection, do not include a bond counsel or an underwriter. *Under no circumstances whatsoever shall this subsection be applied to require purchasers to establish scienter on the part of bond counsels or underwriters.*

(Italics ours.) RCW 21.20.430(7) (Laws of 1985, ch. 171, § 1). The Legislature again amended RCW 21.20.430(7) in 1986, adding that:

> The provisions of this subsection *are retroactive* and apply to any action commenced but not final before July 27, 1985. In addition, the provisions of this subsection apply to any action commenced on or after July 27, 1985.

(Italics ours.) RCW 21.20.430(7) (Laws of 1986, ch. 304, § 1).

1. *Equal Protection*

Initially, plaintiffs and intervenors argue that RCW 21.20.430(7) violates their state and federal equal protection guaranties by treating similarly situated persons unequally. They contend that RCW 21.20.430(7) impermissibly distinguishes between public and private defendants, and in-state and out-of-state public issuers.

Within the context of their equal protection claims, intervenors also contend that RCW 21.20.430(7) violates the federal commerce clause because it discriminates between in-state and out-of-state public issuers. However, intervenors' argument mischaracterizes the nature of the commerce clause. While the commerce clause is designed to prevent states from burdening the free flow of interstate commerce, *Massachusetts v. United States,* 435 U.S. 444, 462, 55 L. Ed. 2d 403, 98 S. Ct. 1153 (1978), the equal protection clause protects persons from unconstitutional discrimination by the states, *Metropolitan Life Ins. Co. v. Ward,* 470 U.S. 869, 881, 84 L. Ed. 2d 751, 105 S. Ct. 1676, *reh'g denied,* 471 U.S. 1120 (1985). Here, intervenors' commerce clause claims are better characterized as part of their equal protection claims; we will consider them as such.

Respondents argue that because plaintiffs' and intervenors' equal protection rights are not affected by the statute's distinction between public and private issuers, and between in-state and out-of-state public issuers, they lack standing to assert these claims. We agree.

The doctrine of standing prohibits a litigant from raising another's legal rights. *Allen v. Wright*, 468 U.S. 737, 750-51, 82 L. Ed. 2d 556, 104 S. Ct. 3315, *reh'g denied*, 468 U.S. 1250 (1984). One who is not adversely affected by a statute may not question its validity. *State v. Carroll*, 81 Wn.2d 95, 103-04, 500 P.2d 115 (1972); *State v. Sluder*, 11 Wn. App. 8, 10, 521 P.2d 971, *review denied*, 84 Wn.2d 1008 (1974). Here, no plaintiff or intervenor is a public or private defendant for RCW 21.20.430(7) purposes, and no out-of-state issuer of securities is party to this suit. Plaintiffs and intervenors improperly attempt to assert the equal protection rights of other parties and nonparties. We conclude that plaintiffs' and intervenors' state and federal equal protection claims fail for lack of standing.

Notwithstanding plaintiffs' and intervenors' lack of standing, respondent/cross-appellant Wood & Dawson argues that RCW 21.20.430(7) violates its equal protection rights by distinguishing between a public issuer's bond counsel, against whom a plaintiff need only establish negligence, and other employees and agents of that issuer, against whom scienter must be proved. Wood & Dawson, as bond counsel to the Supply System, a public issuer within the meaning of RCW 21.20.430(7), does have standing to assert its equal protection claims.

[9] A party challenging a legislative classification has the heavy burden of overcoming the presumption of a statute's constitutionality. *Yakima Cy. Deputy Sheriff's Ass'n v. Board of Comm'rs*, 92 Wn.2d 831, 835, 601 P.2d 936 (1979), *appeal dismissed*, 446 U.S. 979, 64 L. Ed. 2d 835, 100 S. Ct. 2958 (1980). A statute should not be declared unconstitutional unless it appears unconstitutional beyond a reasonable doubt. *State v. Maciolek*, 101 Wn.2d 259, 263, 676 P.2d 996 (1984).

[10] At the threshold of any equal protection determination, the court must identify the appropriate standard of judicial review. *Convention Ctr. Coalition v. Seattle*, 107 Wn.2d 370, 378, 730 P.2d 636 (1986). Here, because RCW 21.20.430(7) does not involve a suspect classification or fundamental right, we apply a rational basis test. *See Convention Ctr. Coalition*, at 378.

Under a rational basis test the court must determine: (1) whether the legislation applies alike to all members within a designated class; (2) whether there are reasonable grounds to distinguish between those within and those without the class; and (3) whether the classification has a rational relationship to the purpose of the legislation. *Convention Ctr. Coalition*, at 378-79.

[11] Wood & Dawson first contends that RCW 21.20.430(7) treats members of the same class differently. Wood & Dawson claims that some "agents" are subject to a scienter standard while other "agents"—bond counsel—are subject only to negligence. We disagree. RCW 21.20.430(7) clearly exempts bond counsel from its definition of agent or employee. As a result, the statute creates a distinction between two classes, agents and bond counsel, not between members of the same class.

Wood & Dawson next argues that no rational basis exists for the RCW 21.20.430(7) distinction between bond counsel and agents. Again we disagree. Under the rational basis test, a statutory classification will be upheld if any state of facts may reasonably be conceived to substantiate it. *Automobile Drivers & Demonstrators, Local 882 v. Department of Retirement Sys.*, 92 Wn.2d 415, 422, 598 P.2d 379 (1979), *appeal dismissed, cert. denied*, 444 U.S. 1040 (1980); *see also Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 528, 3 L. Ed. 2d 480, 79 S. Ct. 437 (1959). Such a rational basis for a legislative decision need not have actually motivated the Legislature's decision. *United States R.R. Retirement Bd. v. Fritz*, 449 U.S. 166, 179, 66 L. Ed. 2d 368, 101 S. Ct. 453 (1980), *reh'g denied*, 450 U.S. 960 (1981).

> States are not required to convince the courts of the correctness of their legislative judgments. . .
>
> [P]arties challenging legislation under the Equal Protection Clause. . . cannot prevail so long as "it is evident from all the considerations presented to [the legislature], and those of which we may take judicial notice, that the question is at least debatable."

Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464, 66 L. Ed. 2d 659, 101 S. Ct. 715, *reh'g denied*, 450 U.S. 1027 (1981) (quoting *United States v. Carolene Prods. Co.*, 304 U.S. 144, 154, 82 L. Ed. 1234, 58 S. Ct. 778 (1938)).

Here, we find several reasonable grounds upon which the Legislature could have based its decision to distinguish agents of public issuers from bond counsel. First, the Legislature could have reasonably concluded that bond counsel should be held to a higher standard of care because of their expertise upon which the public at large has a right to rely. Also, the Legislature may have concluded that because bond counsel, like underwriters, are among the last "links in the chain" in the sale of bonds to the public, they are in a better position to protect the public from misrepresentations or omissions in the sale of securities. Thus, the Legislature may have retained a negligence standard to encourage greater diligence on the part of bond counsel prior to distribution of bonds to the public. Furthermore, bond counsel typically provides the principal opinion letter upon which the underwriters, investors and issuers rely to determine the validity of an offering. *See* Comment, *The Function and Professional Responsibilities of Bond Counsel*, 16 Urb. Law. 489, 490-91 (1984). Bond counsel therefore perform different functions than other agents or employees of public issuers. Finally, the Legislature may have reasonably distinguished between bond counsel and public issuer agents and employees on the basis of compensation. Here, for example, plaintiffs allege that respondent bond counsels' compensation was based on a percentage of the dollar value of the bonds sold. See Plaintiffs' third amended complaint, at 48; Clerk's Papers, at 1044. Bond counsel may have a greater incentive to "sell" the bonds than do agents or employees of public issuers who are compensated by contract. The Legislature could have determined that bond counsel are thus more profit oriented and less public interest oriented than other agents of a public issuer. We conclude that reasonable grounds exist to support the Legislature's distinction between bond counsel and other agents or employees of public issuers of securities.

With these grounds on which the Legislature could have based its classifications in mind, we also conclude that the classifications are rationally related to the remedial purposes of the WSSA. Presuming that the Legislature had reason to distinguish between bond counsel and other agents of public issuers on the basis of their abilities to protect the public, the Legislature's decision to hold bond counsel to a negligence standard must prevail.

Therefore, because there exists a reasonable basis for the Legislature's distinction between bond counsel and other agents of public issuers and because this basis is rationally related to the overall purpose of the WSSA, we conclude that RCW 21.20.430(7) does not violate Wood & Dawson's state or federal equal protection rights.

2. *Special Legislation*

[12] We also find that RCW 21.20.430(7) is not special legislation prohibited by Const. art. 2, § 28(17). It is a general law applicable to all public issuers of securities that are exempt from registration under RCW 21.20.310. *See Libby, McNeill & Libby v. Ivarson*, 19 Wn.2d 723, 730, 144 P.2d 258 (1943) (special laws relate to particular persons or things, while general laws operate on all persons or things constituting a class); *Swanson v. School Dist. 15*, 109 Wash. 652, 654, 657, 187 P. 386 (1920) (statute relieving school districts and their officers, agents or employees from liability for injuries arising out of manual training equipment not special legislation because the act applied to all school districts in state). Moreover, a party challenging a statute as special legislation must show that the classification made by a statute, as well as the statute itself, is not rationally related to the purpose of the statute. *See Seattle v. State*, 103 Wn.2d 663, 675, 694 P.2d 641 (1985). Here, as our equal protection analysis demonstrates, the Legislature's classification in RCW 21.20.430(7) is a rational one, related to the overall purposes of the WSSA. Plaintiffs and intervenors fail to overcome the presumption of constitutionality as required. We conclude that RCW

21.20.430(7) is not special legislation prohibited by Const. art. 2, § 28(17).

3. *Due Process*

Next, Intervenors argue that retroactive application of RCW 21.20.430(7) violates their state and federal due process rights. We find this argument without merit.

[13] A claimant alleging deprivation of due process must first establish a legitimate claim of entitlement. *Meyer v. U.W.* 105 Wn.2d 847, 853, 719 P.2d 98 (1986). Legitimate claims of entitlement entail vested liberty or property rights. *In re Marriage of MacDonald*, 104 Wn.2d 745, 748, 709 P.2d 1196 (1985). A claimant has no vested right in the continuation of existing statutory law. *MacDonald*, at 750. This court has held that statutory tort claim rights under Washington law are not vested absent a final, unreviewable judgment. *Seattle Rendering Works, Inc. v. Darling-Delaware Co.*, 104 Wn.2d 15, 19, 701 P.2d 502 (1985); *Johnson v. Continental West, Inc.*, 99 Wn.2d 555, 563, 663, P.2d 482 (1983); *Haddenham v. State*, 87 Wn.2d 145, 149-50, 550 P.2d 9 (1976); *Sparkman & McLean Co. v. Govan Inv. Trust*, 78 Wn.2d 584, 587, 478 P.2d 232 (1970). Moreover, property interests for federal due process purposes are not created by the United States Constitution, but instead stem from independent sources such as state law. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538, 84 L. Ed. 2d 494, 105 S. Ct. 1487 (1985).

Here, because intervenors have no claim of entitlement to the pre-amendment terms of RCW 21.20.430(7), we conclude that retroactive application of the section does not implicate any interest protected by state or federal due process guaranties.

4. *Separation of Powers*

Intervenors also unclearly allege separation of powers arguments as part of their due process claims. We find these arguments unpersuasive.

[14] A statute prescribing new rules to be applied to pending litigation is generally constitutional because it does not violate the separation of powers clause. 16 C.J.S. *Constitutional Law* § 127 (1984). Separation of powers principles are violated only when the Legislature infringes on a judicial function. *See United States v. Board of Educ.*, 588 F. Supp. 132, 134 (N.D. Ill. 1984); *In re Consol. United States Atmospheric Testing Litig.*, 616 F. Supp. 759, 770-71 (N.D. Cal. 1985); *United States v. Brainer*, 691 F.2d 691, 695 (4th Cir. 1982); *United States v. Sioux Nation of Indians*, 448 U.S. 371, 402-05, 65 L. Ed. 2d 844, 100 S. Ct. 2716 (1980).

Intervenors rely on *United States v. Klein*, 80 U.S. (13 Wall.) 128, 146-47, 20 L. Ed. 519 (1871), condemning congressional attempts to alter the rule of decision in pending litigation. However, we note that courts have restricted *Klein* since it was decided over 100 years ago:

> [T]he better reading of *Klein* is quite narrow and construes the case as holding only that Congress violates the separation of powers when it presumes to dictate "how the Court should decide an issue of fact (under threat of loss of jurisdiction)" and purports "to bind the Court to decide a case in accordance with a rule of law independently unconstitutional on other grounds."

Brainer, at 695 (quoting P. Bator, D. Shapiro, P. Mishkin & H. Wechsler, *The Federal Courts and the Federal System* 316 n.4 (2d ed. 1973)); *In re Consol. United States Atmospheric Testing Litig.*, 820 F.2d 982, 992, (9th Cir. 1987). We find *Klein* distinguishable from the present case.

Here, the Legislature's retroactive amendment of RCW 21.20.430 does not impede upon the court's right and duty to apply new law to the facts of this case. It does not dictate how the court should decide a factual issue, nor does it affect a final judgment. Instead, the amendment is a legislative enactment of a facially neutral law for the court to apply to the facts before it. We find no violation of separation of powers principles.[1] *See In*

[1] Our analysis leads us to a contrary result to that reached by the federal district court in In re Washington Public Power Supply System Securities Litigation (W.D. Wash. Apr. 30, 1987) (MDL 551) (Order).

re Consol. United States Atmospheric Testing Litig., supra, at 992 (no violation of separation of powers where act neither directs the court to make a certain finding of fact, nor requires it to apply an unconstitutional law).

5. *Impairment of Contracts*

Finally, plaintiffs argue that retroactive application of the RCW 21.20.430(7) scienter standard impairs their contractual right to recover for negligence under their bond contracts. They contend that because negligence was the standard of liability before the RCW 21.20.430(7) amendment, that standard was incorporated into their bond contracts and cannot now be changed by the Legislature. We disagree.

[15] The Washington and federal provisions forbidding impairment of contract are given similar effect. *Ruano v. Spellman,* 81 Wn.2d 820, 825, 505 P.2d 447 (1973). Both clauses forbid laws that impair the "obligation of contracts". *See* U.S. Const. art. 1, § 10; Const. art. 1, § 23. The contracts clause is applicable only if the legislative act complained of impairs a contractual relationship. *Allied Structural Steel Co. v. Spannaus,* 438 U.S. 234, 244-45, 57 L. Ed. 2d 727, 98 S. Ct. 2716, *reh'g denied,* 439 U.S. 886 (1978). The impaired relationship must be a "contract" in the usual sense of the word "signifying an agreement of two or more minds, upon sufficient consideration, to do or not to do certain acts." *Crane v. Hahlo,* 258 U.S. 142, 146, 66 L. Ed. 514, 42 S. Ct. 214 (1922). A contract clause claim based on statutory rights succeeds only if "the language and circumstances evince a legislative intent to create private rights of a contractual nature enforceable against the State." *See United States Trust Co. v. New Jersey,* 431 U.S. 1, 17 n.14, 52 L. Ed. 2d 92, 97 S. Ct. 1505, *reh'g denied,* 431 U.S. 975 (1977). The contracts clause does not prohibit the states from repealing or amending statutes generally, or from enacting legislation with retroactive effects. *United States Trust Co.,* at 17.

Here, plaintiffs argue that the negligence standard existing prior to the RCW 21.20.430(7) amendment became a part of

their bond contracts because their bond purchases pursuant to the contracts were made in contemplation of existing law.

Initially, we note that in situations where statutes govern the interpretation and enforcement of private agreements, such statutes may create contractual rights because the statutes define the parties' contractual rights. *United States Trust Co.*, at 17 n.14; *Tremper v. Northwestern Mut. Life Ins. Co.*, 11 Wn.2d 461, 463-64, 119 P.2d 707 (1941) (statutory change in rule for interpreting the interest term on life insurance policy loans would have changed the meaning of an agreed term in a life insurance contract). However, where a general statute involved provides a remedy, which is later changed, the previous remedy will not ordinarily be implied as an unexpressed term of an otherwise express contract. *See Chicago & A. R.R. v. Tranbarger*, 238 U.S. 67, 76, 59 L. Ed. 1204, 35 S. Ct. 678 (1915).

Here, the negligence standard existing prior to the RCW 21.20.430(7) amendment was part of a statutory remedy. It was not expressly incorporated as a term of the bond contract. Moreover, the negligence standard did not define any party's rights pursuant to the bond contract. Thus, the RCW 21.20.430(7) amendment requiring scienter in place of negligence did not affect, much less impair, the terms of the contract.

Nevertheless, plaintiffs contend that the subsequent amendment to require scienter diminished the value of their bonds, thus unconstitutionally impairing the force of their contracts. Plaintiffs rely on *Metropolitan Seattle v. O'Brien*, 86 Wn.2d 339, 352, 544 P.2d 729 (1976), for the proposition that an action by the State "though indirect, which diminishes the value of the contract constitutes a prohibited impairment." We disagree with plaintiffs' broad reading of *O'Brien*. In *O'Brien*, the Legislature authorized certain taxes to provide security for a city's debt service obligations pursuant to the city's issuance of bonds. *O'Brien*, at 342. This security, which substantially exceeded the actual debt requirements, was found to be an important reason for favorable bond ratings and an important factor in the bondholders' decisions to purchase the bonds. *O'Brien*, at 351. It was within this context that the court held

that a state official's withholding of the funds impaired the bondholders' contract because his actions diminished the value of the bonds by affecting the security underlying them. *O'Brien*, at 352.

Here, we do not believe that the negligence standard of liability in force at the time of the bond purchases was an important reason for favorable bond ratings or an important factor in the bondholders' decisions to purchase the bonds. Moreover, unlike the State's action in *O'Brien*, which directly affected a security pledged in the bond contract, here the Legislature's amendment of a general civil liability provision of the WSSA only changed the element of a statutory remedy that was never a part of the bond contract. We conclude that the Legislature's amendment in RCW 21.20.430(7) did not unconstitutionally impair any of plaintiffs' contractual rights.

Finally, plaintiffs contend that because RCW 21.20.430(7) by its express terms applied only to RCW 21.20.010(2), their negligence claims under RCW 21.20.010(3) still survive. However, plaintiffs point to no trial court ruling on this issue. Therefore, we decline to address the issue as it is not properly before the court. Overall we conclude that the trial court properly applied RCW 21.20.430(7) to require plaintiffs and intervenors to show scienter on the part of respondents coming within its terms to establish their violation of RCW 21.20.010(2).

V

Derivative Professional Negligence and Malpractice Claims

Plaintiffs and intervenors seek reversal of the trial court's dismissal of their derivative negligence and malpractice claims against respondent professionals for services rendered to the Supply System.

In a derivative suit, a stockholder asserts rights or remedies belonging to the corporation for the corporation's benefit. 12B W. Fletcher, *Private Corporations* § 5907 (1984). Such suits arise in equity to enforce a corporate right which the corpo-

ration fails, is unable, or refuses to assert by court action. *LaHue v. Keystone Inv. Co.*, 6 Wn. App. 765, 777, 496 P.2d 343 (1972); *Goodwin v. Castleton*, 19 Wn.2d 748, 761-62, 144 P.2d 725 (1944). Derivative suits are disfavored and may be brought only in exceptional circumstances. *See LaHue*, at 777. Double derivative actions usually occur when a stockholder of a parent or holding company sues to enforce a cause of action in favor of a subsidiary company. 13 W. Fletcher, *Private Corporations* § 5977 (1984); H. Henn & J. Alexander, *Corporations* 1056 (3d ed. 1983). The ultimate beneficiary of a double derivative action is the corporation that possesses the primary right to sue. N. Lattin, *Corporations* 367-68 (1959).

A

Standing

Here, plaintiffs and intervenors sue through Chemical Bank, asserting its right as bond trustee to sue on the Supply System's behalf for injury resulting from the professionals' negligence. The Supply System and the respondent professionals challenge plaintiffs' and intervenors' authority to bring derivative claims. In turn, plaintiffs and intervenors challenge the Supply System's and the professionals' standing to challenge their authority. They assert that only Chemical Bank, their trustee, has standing to contest their authority to sue derivatively. They note that Chemical Bank does not challenge their authority, and has filed no brief in this appeal. We find plaintiffs' and intervenors' standing arguments unpersuasive.

[16] Standing to challenge a derivative plaintiff's failure to comply with the procedural requirements of a derivative suit lies with the entity the plaintiff seeks to represent. *Colan v. Monumental Corp.*, 524 F. Supp. 1023, 1028 (N.D. Ill. 1981); *Prager v. Sylvestri*, 449 F. Supp. 425, 429 (S.D.N.Y. 1978); *see* Note, *Defenses in Shareholders' Derivative Suits — Who May Raise Them*, 66 Harv. L. Rev. 342, 343, 346 (1952) (proper party to invoke defense is party whom defense is designed to protect). Here, because plaintiffs' and intervenors' claims against the professionals are "double derivative" in nature, it follows that the entity they ultimately seek to represent is the Supply System, through Chemical Bank. See Brief of Appellant

Haberman, at 69 (derivative claims here are by definition for benefit of Supply System). Therefore, the Supply System has standing to challenge these claims. Moreover, other courts have granted standing to defendants other than the corporation to assert derivative plaintiffs' lack of authority to sue for failure to comply with procedural requirements. *See, e.g., Shlensky v. Dorsey*, 574 F.2d 131, 142 (3d Cir. 1978) (accountant for corporation had standing to raise plaintiffs' noncompliance with procedural requirements for derivative suit); *Dietzel v. Anger*, 8 Cal. 2d 373, 377-78, 65 P.2d 803 (1937) (defendant shareholders challenged derivative bondholder suit based on failure to meet indenture demand requirements). We conclude that respondents have standing to challenge plaintiffs' and interventors' authority to bring these "double derivative" claims.

B

Equitable Stockholder Derivative Claims

[17] To begin with, we note that plaintiffs and intervenors blur the distinction between a stockholder's equitable right to sue derivatively and a bondholder's right, which is contractual in nature. Standing to bring a stockholder derivative claim requires a proprietary interest in the corporation whose right is asserted. *Kauffman v. Dreyfus Fund, Inc.*, 434 F.2d 727, 735-36 (3d Cir. 1970), *cert. denied*, 401 U.S. 974 (1971). A creditor has no equitable standing to sue derivatively. *Dodge v. First Wis. Trust Co.*, 394 F. Supp. 1124, 1127 (E.D. Wis. 1975); *see* CR 23.1 (referring to *Stockholders'* rights to bring derivative suit). Thus, as bondholders, plaintiffs and intervenors are only creditors of the Supply System with no proprietary interest, they have no equitable right to bring derivative claims.

C

Bondholder Derivative Claims

Because there is no governing body of statutory or common law that protects bondholders against harmful acts by issuers except in the most extreme situations, bondholders' rights are created and protected by contracts between the

bondholders and issuers. *See* American Bar Found., *Indentures* 2 (1971). These "Debenture Indentures" commonly designate a trustee to protect the bondholders' contractual rights created pursuant to the indenture. *Indentures*, at 2, 8. Although debts created by bonds issued run directly from the issuer to the bondholders, the contractual rights conferred by indentures run from the issuer to the trustee for the bondholders' benefit. *Indentures*, at 8, 233; *see also* Note, *The Rights and Remedies of the Bondholder Under Corporate Bonds and Indentures; I*, 27 Colum. L. Rev. 443, 445 (1927).

Here, the WNP 4 and WNP 5 bonds were issued according to the authority granted the Supply System in resolution 890, an indenture agreement between the Supply System and the bondholders. Resolution 890 reflects provisions commonly contained in debenture indentures. Section 11.4 of resolution 890 authorizes the bond fund trustee, Chemical Bank, to sue on the bondholders' behalf in the event of default, and to sue on the Supply System's behalf in a derivative-type capacity upon request of a majority of the bondholders. Clerk's Papers, Second Supplemental Index, at 92, 96.

Section 11.5, a "no action" provision, precludes suit pursuant to a right created in resolution 890 unless 20 percent of the bondholders serve a formal demand upon the trustee, a reasonable time passes for the trustee to respond to the demand, and the would-be plaintiffs furnish security and indemnity to the trustee. Such "no action" provisions serve to ensure that a few bondholders take no advantage of corporate assets over other bondholders, to avoid burdensome multitudinous suits where one would suffice, and to ensure that the security of all the bondholders is not threatened by a minority action that a large majority believes hostile to its interests. *Quirke v. St. Louis — San Francisco Ry.*, 277 F.2d 705, 709-10 (8th Cir.), *cert. denied*, 363 U.S. 845 (1960); *Moore v. Tumwater Paper Mills*, 181 Wash. 45, 52-53, 42 P.2d 29, *cert. denied*, 296 U.S. 597 (1935); *Indentures*, at 232-33.

We note also that section 11.5 distinguishes between bondholder suits to enforce payment of the principal and interest on the bonds and bondholder suits pursuant to con-

tractual rights created in resolution 890. See resolution 890, § 11.5, Clerk's Papers, Second Supplemental Index, at 96. While the "no action" provision of section 11.5 explicitly governs all rights of action pursuant to resolution 890, it does not impair or affect the Supply Systems' underlying obligation for principal and interest to the bondholders, nor the bondholders' ability to enforce payment of their bonds. Resolution 890, § 11.5, Clerk's Papers, Second Supplemental Index, at 96.

Plaintiffs and intervenors contend that resolution 890's procedural restrictions do not bar their maintenance of these derivative claims because the limitations were inadequately incorporated in the bonds.

The WNP 4 and WNP 5 bonds provided that;

> [R]eference [to resolution 890] is hereby made for a more complete description of the . . . remedies of the holders of the bonds with respect thereto . . .
>
> In case an Event of Default (as defined by resolution 890) shall occur, the principal of the bonds . . . at such time outstanding may be declared due and payable by the Bond Fund Trustee or by the holders of 20% in principal amount of such Bonds . . . but such declaration may, under certain circumstances, be annulled.

Clerk's Papers, at 3219, 3221.

[18] Where bonds contain no restriction, either directly or by reference, against an action on them, a holder may maintain a separate action without reference to the provisions of an indenture regardless of the restrictions which might otherwise be binding. *See Snyder v. Yakima Fin. Corp.*, 174 Wash. 499, 508, 25 P.2d 108 (1933). In *Snyder*, however, the bonds contained *no* reference to restrictions on bondholders' rights to sue. *Snyder*, at 508. In cases where the bonds refer to the indenture agreement, bondholders are bound by the terms of the indenture. *See Colsky v. Eyres Storage & Distrib. Co.*, 178 Wash. 404, 407, 34 P.2d 1114 (1934). Plaintiffs and intervenors cite other decisions holding that passing reference to an indenture cannot restrict bondholders' rights to sue if the bond is not paid at maturity. Plaintiffs and intervenors ignore the distinction between restrictions placed on rights created by the

indenture contract, *e.g., derivative authority, and rights existing apart from the contract, e.g.,* right to enforce debt owed. Indeed, in *all* of the cases cited, unlike the present derivative action for negligence, the indenture involved restricted the bondholders' rights to collect interest or principal when due. *See, e.g., Guardian Depositors Corp. v. David Stott Flour Mills, Inc.*, 291 Mich. 180, 185, 289 N.W. 122 (1939); *Scott v. Platt*, 171 Or. 379, 391, 135 P.2d 769, 775, 137 P.2d 975 (1943). *Bank of Cal. v. National City Co.*, 138 Wash. 517, 524, 244 P. 690, *rev'd on other grounds on rehearing*, 141 Wash. 243, 251 P. 561 (1926); *Friedman v. Airlift Int'l, Inc.*, 44 A.D.2d 459, 355 N.Y.S.2d 613, 614-15 (1974) (expressly distinguishing incorporation by reference of restrictions on suit for interest owed from incorporation by reference of a special collection right created by indenture). Here, the face of the WNP 4 and WNP 5 bonds referred readers to resolution 890 for a complete description of the remedies available to bondholders. A bondholder would necessarily look to the resolution to determine whether derivative rights existed, and would also discover restrictions on any such right created. Thus, the present case is distinguishable from situations where a bondholders' right to sue for principle and interest owed is involved. Moreover, resolution 890 was properly incorporated in the bonds.

Plaintiffs also argue that they are not bound by resolution 890 because they were induced to become parties to it by untrue statements and omissions of material facts in the Official Statements. However, no allegations of misstatements in resolution 890 are made in plaintiffs' complaint. In any event, misstatements in the Official Statements are not relevant to whether the WNP 4 and WNP 5 bonds adequately notified bondholders of the rights and restrictions created by resolution 890. Here, we find that the bonds gave bondholders notice of resolution 890, and thus that plaintiffs are bound by its terms. We therefore decline to reform the clear terms of resolution 890.

We also reject intervenors' attempt to sue in place of Chemical Bank pursuant to the language in the bonds giving holders of 20 percent in principal amount of the bonds the right

to declare the bonds due upon default. Intervenors' derivative claims do not seek to declare the bonds due, but rather are for negligence and malpractice against professionals not parties to the bonds.

We conclude that plaintiffs' and intervenors' derivative negligence claims are governed by resolution 890, and the demand requirements of section 11.5.

Alternatively, plaintiffs and intervenors assert that they were excused from the resolution 890 demand requirements. First, they argue that any demand on Chemical Bank would have been futile because they were not allowed to intervene in *Chemical Bank* II and because Chemical Bank has not supported them in their attempts to bring these derivative claims. They also contend that Chemical Bank waived the demand requirements by failing to object to this action.

[19] Few cases address the issue of whether and when a bondholder must comply with indenture demand requirements in indentures authorizing a trustee to sue derivatively in place of the corporation. *But see Quirke v. St. Louis-San Francisco R.R., supra* at 709 (upholding similar no action clause). However, cases interpreting Fed. R. Civ. P. 23.1, requiring shareholders to demand that the corporation sue before suing derivatively, provide guidance by analogy. The Fed. R. Civ. P. 23.1 demand requirement is intended to allow the corporation an opportunity to take over a suit brought on its behalf. *Lewis v. Graves*, 701 F.2d 245, 247 (2d Cir. 1983). Whether the demand requirement is excused is within the trial court's discretion. *DePinto v. Provident Sec. Life Ins. Co.*, 323 F.2d 826, 830 n.7 (9th Cir. 1963), *cert. denied*, 376 U.S. 950 (1964); 3B J. Moore, *Federal Practice* § 23.1.19, at 23.1-83 (1987). Thus, a trial court's determination of whether demand requirements are excused will only be reversed for a manifest abuse of discretion. *Lewis*, at 248.

The doctrine of futility excuses demand on directors when the majority of the directors are the alleged wrongdoers. Note, *Demand on Directors and Shareholders as a Prerequisite to a Derivative Suit*, 73 Harv. L. Rev. 746, 753 (1960); 3B J. Moore, *Federal Practice* § 23.1.19, at 23.1-87, -89 (1987); *see,*

e.g., Jannes v. Microwave Communications, Inc., 57 F.R.D. 18, 21 (N.D. Ill. 1972); *First Wis. Nat'l Bank v. Brynwood Land Co.*, 245 Wis. 610, 15 N.W.2d 840 (1944) (demand upon bondholders futile because majority bondholders were engaged in acts giving rise to action); *GE Co. v. Bucyrus-Erie Co.*, 563 F. Supp. 970, 974 (S.D.N.Y. 1983); *Clark v. Lomas & Nettleton Fin. Corp.*, 625 F.2d 49, 53-54 (5th Cir.), *reh'g denied*, 632 F.2d 894 (1980), *cert. denied*, 450 U.S. 1029 (1981); *Clay v. Selah Vly. Irrig. Co.*, 14 Wash. 543, 548-49, 45 P. 141 (1896) (bondholders excused from notice where corporation conspired with trustee to dispose of property contrary to deed provisions and deceived them as to amount due on mortgage). However, it is well established that futility is not established by mere approval or acquiescence by a corporation. *Kaufman v. Safeguard Scientifics, Inc.*, 587 F. Supp. 486, 489 (E.D. Pa. 1984); *Lewis v. Graves*, 701 F.2d at 248. Finally, courts may excuse demand upon a trustee when the trustee is involved in a lawsuit arising out of the same facts asserting the same claims as the bondholders' claims. *Morgan Stanley & Co. v. Archer Daniels Midland Co.*, 570 F. Supp. 1529, 1539 n.2 (S.D.N.Y. 1983) (trustee intervened in bondholder suit rendering demand irrelevant); *Campbell v. Hudson & Manhattan R.R.*, 277 A.D. 731, 102 N.Y.S.2d 878, 882, *aff'd*, 302 N.Y. 902 (1951) (trustee's complaint urged that court grant relief requested by plaintiffs); *see Thornton v. Evans*, 692 F.2d 1064, 1080 (7th Cir. 1982) (court excused demand because trustees had notice of claims; trustees filed identical suit to beneficiaries' but failed to name certain defendants who breached trust.)

Here, demand on Chemical Bank was not excused on the basis of futility. Chemical Bank is not the target of plaintiffs' and intervenors' allegations of negligence. Moreover, Chemical Bank's failure to sue the professionals does not excuse the demand requirements because Chemical Bank had no reason to take action. As noted by Chemical Bank's attorney at trial, "nobody has moved against us or we have not moved against anyone. So there's no reason for us to take a position." Report of Proceedings Vol. II, at 9. Likewise, Chemical Bank's failure to support plaintiffs' intervention in *Chemical Bank* II does not excuse demand. No claims against respondent professionals

were involved there, and this court will not presume that Chemical Bank knew of any alleged negligence or malpractice.

Next, plaintiffs and intervenors contend that formal demand, by 20 percent of the bondholders should be excused because to do so would be too costly. This argument is without merit. We note that shareholders may be excused from serving demand on other shareholders as required by Fed. R. Civ. P. 23.1 when onerous expense is involved. *Messinger v. United Canso Oil & Gas Ltd.*, 80 F.R.D. 730, 738 (D. Conn. 1978); *Levitt v. Johnson*, 334 F.2d 815, 818 (1st Cir. 1964), *cert. denied*, 379 U.S. 961 (1965). However, locating 20 percent of the bondholders presents no onerous expense here because nearly 20 percent of the bondholders are already parties to this action. See Brief of Appellant Haberman, at 74; Brief of Intervenors, at 104.

Finally, plaintiffs argue that demand should be excused because the statute of limitations has run against the Supply System for its choses in action against the professionals for negligence. Plaintiffs contend that these actions will be lost if this court upholds the dismissal of these derivative claims.

At least one court has noted that a factor in determining whether shareholders are excused from Fed. R. Civ. P. 23.1 demand requirements is if a limitations period might run in the time necessary to serve such a demand. *Levitt*, at 817. However, whether a demand is excused because a limitations period will run is gauged at the time the action is commenced, not afterward with the benefit of hindsight. *Lewis v. Graves*, 701 F.2d at 250. Here, at the time plaintiffs and intervenors commenced this action in 1985, the statute of limitations had not yet run. Therefore, demand could have been served in 1985 to preserve these choses in action. Because excuse is measured at that time, plaintiffs and intervenors cannot be excused from demand requirements on this basis.

We conclude that plaintiffs' and intervenors' double derivative claims against respondent professionals for negligence and malpractice were properly dismissed by the trial court. The claims are governed by the terms of resolution 890

and plaintiffs and intervenors have failed to meet the demand requirements contained in section 11.5. Because we determine that plaintiffs and intervenors have not met the procedural prerequisites to their claims, we need not address their substantive derivative claims against respondent professionals for malpractice and negligence.

D

Equitable Creditor Claims

Plaintiffs also allege their derivative claims as equitable creditors of the Supply System. They contend that the Supply System's rights of action against the respondent professionals constitute equitable assets recoverable by the creditor-bondholders to satisfy debts represented by the bonds.

[20] Such "creditor suits" are brought to compel the discovery and application of equitable assets or property to the payments of debts. However, "a general creditor with a mere legal demand may not, in the absence of statutory authorization, come into equity to collect his claim." 21 C.J.S. *Creditors' Suits* § 43 (1940). The debt must be reduced to judgment before an equitable creditor action can be brought. *Hamburger Apparel Co. v. Werner*, 17 Wn.2d 310, 317, 322, 135 P.2d 311 (1943); *see Woody's Olympia Lumber, Inc. v. Roney*, 9 Wn. App. 626, 513 P.2d 849 (1973) (allowing attachment of debtor's tort action after creditor's claim reduced to judgment).

Here, the trial court dismissed plaintiffs' claims as inadequately pleaded. Notwithstanding the pleadings, we hold that plaintiffs' equitable creditor claims fail for want of a judgment. The trial court properly dismissed all derivative claims.

VI

Negligent Misrepresentation and Fraud

The trial court dismissed intervenors' common law fraud and negligent misrepresentation claims against all respondents. The trial court concluded that intervenors' claims were barred by principles of discretionary immunity, the public duty doctrine, and sovereign immunity as applied to out-of-state respondents through choice of law rules. The trial court alternatively held that intervenors' negligent misrepresentation claims against the respondent professionals failed for lack of duty. Intervenors contend that their claims are not barred by immunity, and that their claims were alleged sufficientiy to state claims for fraud and negligent misrepresentation against respondent professionals. We agree.

A

Discretionary Immunity

[21] Discretionary immunity is a narrow court-created exception to the Legislature's abolition of sovereign immunity. *Bender v. Seattle*, 99 Wn.2d 582, 587, 664 P.2d 492 (1983); *Evangelical United Brethren Church v. State*, 67 Wn.2d 246, 255, 407 P.2d 440 (1965). Discretionary immunity serves to assure that courts refuse to pass judgment on policy decisions in the province of coordinate branches of government. *Bender*, at 588; *King v. Seattle*, 84 Wn.2d 239, 246, 525 P.2d 228 (1974). To be protected by such immunity, and act, omission, or decision must involve an exercise of basic policy evaluation, judgment and expertise by the governmental agency involved. *Evangelical United Brethren Church*, at 255. The activity must involve basic policy discretion rather than the implementation of policy. *Mason v. Bitton*, 85 Wn.2d 321, 327-29, 534 P.2d 1360 (1975); *Bender*, at 588-90. Thus, only "high level discretionary acts exercised at a truly executive level" are protected. *Bender*, at 588.

Arguably, the Supply System's decision to build the WNP 4 and WNP 5 is immune as a discretionary act. However,

intervenors challenge the means by which that decision was carried out. Intervenors allege that respondents made fraudulent statements and omissions, which were used in the Official Statements and Annual Reports by the Supply System to sell bonds to finance the project. Thus, the acts complained of by intervenors do not involve discretionary acts, or policy decisions by the Supply System; rather they involve the mechanism by which the Supply System implemented its decision to build the project. As a result, discretionary immunity does not bar intervenors' fraud claims. *See Miothke v. Spokane*, 101 Wn.2d 307, 337, 678 P.2d 803 (1984) (decision to build sewage bypass was not a basic policy decision protected by discretionary immunity because the decision was based on technical engineering and scientific judgment); *Stewart v. State*, 92 Wn.2d 285, 294, 597 P.2d 101 (1979) (decision to build a freeway was a basic policy decision, but its design and lighting was not protected by discretionary immunity). *Algona v. Pacific*, 35 Wn. App. 517, 520, 667 P.2d 1124, *review denied*, 100 Wn.2d 1028 (1983) (municipality furnishing sewer facilities functioning in proprietary capacity and not immune to suit).

B

Public Duty Doctrine

[22] The public duty doctrine determines the scope of duty involved where public services are provided. *J & B Dev. Co. v. King Cy.*, 100 Wn.2d 299, 303, 669 P.2d 468, 41 A.L.R.4th 86 (1983). The doctrine limits governmental liability arising out of its provision of public services to breach of a duty owed specifically to one plaintiff, rather than the public generally. *J & B Dev. Co.*, at 303-05.

Here, intervenors' allegations of fraud do not arise out of a service to the general public. Instead, they involve alleged fraud in the course of raising private funds for public use. Moreover, the Supply System issued its statements and reports pursuant to the securities laws, not a general public duty. We conclude that the public duty doctrine is inapplicable to this case.

C

Sovereign Immunity

The trial court also held that intervenors' common law fraud claims against respondent Oregon and Idaho Utilities were barred by Oregon and Idaho sovereign immunity principles. We disagree.

[23] Resolution 890, pursuant to which the Oregon and Idaho Utilities entered into the Participants' Agreements, provides that the resolution and the bonds be construed and governed by Washington law. Resolution 890, § 14.11. Although a choice of law provision in a contract does not govern tort claims arising out of the contract, it may be considered as an element in the most significant relationship test used in tort cases. *See Kammerer v. Western Gear Corp.*, 96 Wn.2d 416, 423, 635 P.2d 708 (1981).

When faced with claims of other states' immunity, this court uses the most significant relationship test, then evaluates the policies behind the interested states whose policies conflict. *Johnson v. Spider Staging Corp.*, 87 Wn.2d 577, 582, 555 P.2d 997 (1976); *Southwell v. Widing Transp., Inc.*, 101 Wn.2d 200, 204, 676 P.2d 477 (1984); *see also Biscoe v. Arlington Cy.*, 738 F.2d 1352, 1359 (D.C. Cir. 1984) (states faced with claims of immunity by sister states have resolved the issue by reference to the forum state's policy on comity, not by rigid application of choice of law rules), *cert. denied*, 469 U.S. 1159 (1985). The elements of the significant relationship test include: (a) the place of injury; (b) the place where the conduct causing the injury occurred; (c) the residence of the parties; and (d) the place where the relationship is centered. Restatement (Second) of Conflict of Laws § 145 (1971).

Here, the most significant relationship is with Washington. A significant number of the parties to this action are Washington residents. The fraudulent acts occurred here where the Supply System, and thus the relationship is centered. Moreover, the planning of the project, the issuance of bonds, and the rendering of allegedly fraudulent services occurred here. Finally, the statements and reports containing the injurious mis-

representations originated in Washington. See also section IV(D).

The policies of the states involved also dictate our application of Washington law. Oregon and Idaho Utilities claim that sovereign immunity reflects their states' interests in protecting their public fisc and ability to govern their operations. On the other hand, the Washington Legislature waived sovereign immunity to discourage tortious governmental conduct, and to hold government responsible for its acts. *Bender v. Seattle, supra* at 590. We believe our application of Washington law here furthers the Washington Legislature's purpose without interfering with Oregon's or Idaho's ability to govern. Our decision recognizes this State's policy of holding government accountable for tortious conduct and only applies to Oregon and Idaho respondents to the extent they acted tortiously in Washington.

Respondents also argue that full faith and credit and comity require that we apply Oregon and Idaho sovereign immunity principles. We disagree.

[24, 25] Full faith and credit does not require a forum state to respect another state's rule on sovereign immunity unless the other state's ability to govern would be threatened. *Nevada v. Hall*, 440 U.S. 410, 424 n.24, 59 L. Ed. 2d 416, 99 S. Ct. 1182, *reh'g denied*, 441 U.S. 917 (1979); *see Mianecki v. Second Judicial Dist. Court*, 99 Nev. 93, 96, 658 P.2d 422, *cert. dismissed*, 464 U.S. 806 (1983). Moreover, the doctrine of comity is not a rule of law, but one of practice, convenience and expediency. *Mast, Foos & Co. v. Stover Mfg. Co.*, 177 U.S. 485, 488, 44 L. Ed. 856, 20 S. Ct. 708 (1900). Comity allows the courts of one jurisdiction to give effect to laws of another jurisdiction out of deference and respect, considering the interests of each state. *Mianecki*, at 97. The decision to invoke comity is within the court's discretion. *Mianecki*, at 98. *Smith v. Fletcher*, 102 Wash. 218, 222, 173 P.19 (1918). Comity does not preclude one state from exercising jurisdiction over another state because of that state's sovereign immunity, especially over claims arising out of securities purchases. *Ehrlich-Bober & Co. v. University of Houston*, 49 N.Y.2d 574, 583, 404 N.E.2d 726,

427 N.Y.S.2d 604 (1980) (any other rule would burden financial institutions with reviewing the laws of every jurisdiction before consenting to do business with any agency of a state).

We conclude that Washington law applies and that the Oregon and Idaho Utilities are not immune to intervenors' common law claims. Therefore, we reverse the trial court's ruling that intervenors' claims are barred by immunity principles.

D

Intervenors' Negligent Misrepresentation Claims Against Professionals

The trial court alternatively dismissed intervenors' claims against the professionals on the basis that the professionals owed no duty beyond that owed to their individual client, the Supply System. We disagree. Intervenors alleged that respondent professionals made and participated in making negligent misrepresentations of fact in the Official Statements and Annual Reports, and negligently omitted facts necessary to make the statements and reports not misleading. Intervenors further alleged that they sufficed pecuniary loss in reliance on the information contained, or not contained, in the statements and reports.

[26] To determine whether a plaintiff has stated a claim for negligent misrepresentation, this court adheres to the standards in the Restatement (Second) of Torts § 552(1), (2) (1977) which provides:

> (1) One who, in the course of his business, profession or employment or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

> (2) Except as stated in Subsection (3), [which pertains to the liability of one who is under a public duty to furnish such information] the liability stated in Subsection (1) is limited to loss suffered
>
> (a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and
>
> (b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

Transamerica Title Ins. Co. v. Johnson, 103 Wn.2d 409, 415-16, 693 P.2d 697 (1985); *Wilbur v. Western Properties*, 22 Wn. App. 458, 463, 589 P.2d 1273 (1979).

In deference to legitimate fears of indeterminate liability to third persons, the Restatement narrows the scope of an action for negligent misrepresentations. Liability does not extend to every person who ultimately becomes aware of the misstatement. Instead, because of the "important social policy of encouraging the flow of commercial information upon which the operation of the economy rests", the defendant must be "manifestly aware of the use to which the information was to be put and intended to supply it for that purpose." Restatement (Second) of Torts § 552, comment *a* (1977). Indeed, "[w]hen there is no intent to deceive but only good faith coupled with negligence, the fault of the maker of the misrepresentation is sufficiently less to justify a narrower responsibility for its consequences." Restatement (Second) of Torts § 552, comment *a*. Liability for negligent misrepresentations is thus limited to cases where (1) the defendant has knowledge of the specific injured party's reliance; or (2) the plaintiff is a member of a group that the defendant seeks to influence; or (3) the defendant has special reason to know that some member of a limited group will rely on the information. *See Chubb Group of Ins. v. C.F. Murphy & Assocs.*, 656 S.W.2d 766 (Mo. Ct. App. 1983). However,

> it is not necessary that the maker should have any particular person in mind as the intended, or even the probable, recipient of the information. In other words, it is not required that the person who is to become the plaintiff

> be identified or known to the defendant as an individual when the information is supplied. It is enough that the maker of the representation intends it to reach and influence either a particular person or persons, known to him, or a group or class of persons, distinct from the much larger class who might reasonably be expected sooner or later to have access to the information and foreseeably to take some action in reliance upon it. It is enough, likewise, that the maker of the representation knows that his recipient intends to transmit the information to a similar person, persons or group. It is sufficient, in other words, insofar as the plaintiff's identity is concerned, that the maker supplies the information for repetition to a certain group or class of persons and that the plaintiff proves to be one of them, even though the maker never had heard of him by name when the information was given.

Restatement (Second) of Torts § 552, comment *h* (1977).

Here, the trial court's CR 12(b)(6) dismissal of intervenors' misrepresentation claims must be reversed. Assuming intervenors' allegations to be true, and considering all conceivable facts in support of them, we cannot say that intervenors have failed to state a claim. *See Lawson v. State*, 107 Wn.2d 444, 448, 730 P.2d 1308 (1986).

Intervenors specifically allege that respondent professionals negligently supplied information to the Supply System, and that the information appeared in the Official Statements and Annual Reports relied upon by intervenors in their decisions to purchase the bonds. As a result of their reliance, intervenors allege pecuniary loss. Additionally, intervenor Amexco alleges that several respondent professionals made personal visits and telephone calls on several occasions to discuss the bonds. Respondents contend that this court should not consider these allegations because they did not appear in intervenors' first amended complaint, and because the telephone calls were raised for the first time on this appeal. However, bound by the CR 12(b)(2) standard of review here, we consider these allegations as hypothetical facts forming a viable conceptual background for the alleged negligent misrepresentations made by respondent professionals. *See Halvorson v. Dahl*, 89 Wn.2d 673, 674-75, 574 P.2d 1190 (1978).

Moreover, it is conceivable that each of the respondent professionals were told by the Supply System of its intent to supply information received from the professionals directly to institutional investors such as the intervenors, either specifically, or as a limited class to induce them to purchase bonds. In such circumstances, intervenors would be part of a limited group which the professionals knew would receive their information and rely on it in making a decision to purchase bonds. Conceivably, the professionals could have intended that intervenors, as institutional investors, benefit from the information so as to induce them to purchase bonds, resulting in favorable bond sales and pecuniary gain to the professionals.

However, because the trial court dismissed intervenors' allegations on the pleadings, we have no factual basis from which to discern respondent professionals' knowledge or intentions. Because this information is necessary to a determination of whether a duty exists to intervenors for alleged misrepresentations, we must remand to the trial court for further factual determinations.

E

Intervenors' Common Law Fraud Claims

In addition to their negligent misrepresentation claims, intervenors also allege fraudulent misrepresentation by all respondents in the Official Statements and Annual Reports.

Respondents first argue that intervenors failed to plead fraud with particularity as required by CR 9(b). The trial court did not decide this issue, but noted that any deficiencies could be cured by a motion for more definite statement. Report of Proceedings vol. III, at 16. Nevertheless, respondents argue that: (1) no allegations that any respondent other than the Supply System supplied information to them appear within intervenors' complaint; (2) intervenors fail to set forth the allegedly fraudulent acts by each respondent; and (3) the allegations in the complaint are too general.

CR 9(b) requires dismissal when a complaint fails to plead fraud with particularity. CR 9(b), like its federal counterpart,

Fed. R. Civ. P. 9(b), ensures that plaintiffs seek redress for a wrong rather than use lawsuits as pretexts to discover unknown wrongs, protects defendants from unnecessary harm to their reputation, and gives defendants sufficient notice to enable them to prepare a defense. *See D & G Enters. v. Continental Ill. Nat'l Bank & Trust Co.*, 574 F. Supp. 263, 266-67 (N.D. Ill. 1983); *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985). The complaining party must plead both the elements and circumstances of fraudulent conduct. 3A L. Orland, Wash. Prac. 129 (3d ed. 1980). Applying CR 9(b) in light of CR 8(a), which requires a "short and plain statement of the claim showing that the pleader is entitled to relief", a complaint must allege specific fraudulent acts, but need not plead evidentiary matters. *See D & G Enterprises*, at 267; *Trak Microcomputer Corp. v. Wearne Bros.*, 628 F. Supp. 1089, 1092 (N.D. Ill. 1985); *Somerville v. Major Exploration, Inc.*, 576 F. Supp. 902, 909 (S.D.N.Y. 1983).

[27] To determine whether allegations of fraud satisfy CR 9(b), the court will consider only the complaint, and not additional allegations made in the briefs. *See Beck v. Cantor, Fitzgerald & Co.*, 621 F. Supp. 1547, 1552 (N.D. Ill. 1985). A complaint adequately alleges fraud if it informs the defendant of who did what, and describes the fraudulent conduct and mechanisms. *Beck*, at 1552 n.3; *Lewis v. Berry*, 101 F.R.D. 706, 708-09 (W.D. Wash. 1984). If a complaint provides this information, then group conduct may be pleaded generally because the defendants have sufficient information to answer the allegations. *In re Equity Funding Corp. of Am. Sec. Litig.*, 416 F. Supp. 161, 181 (C.D. Cal. 1976). "[W]hen a plaintiff sues individual group members on the basis of the collective product of the group, specific allegations about the role of each defendant are unnecessary." *In re Consumers Power Co. Sec. Litig.*, 105 F.R.D. 583, 593 (E.D. Mich. 1985).

Here, intervenors' complaint specifies the allegedly fraudulent information supplied or omitted by each respondent to the Supply System, the individual respondent compiling and disseminating this information, and what statements were in the Official Statements and Annual Reports. Clerk's Papers, at

640-53; First Amended Complaint, paras. 12-57. Intervenors' complaint then alleges the elements of fraud based on the assertions made in, or omitted from, the Official Statements and Annual Reports. Clerk's Papers, at 692-94; First Amended Complaint, paras. 195-201. Although the pleadings do not set forth circumstances illustrating respondents' knowledge of their misrepresentations (scienter), CR 9(b) specifies that knowledge may be averred generally. Therefore, as intervenors' complaint gave respondents sufficient notice of the allegations to allow them to prepare their answer and defense, we conclude that intervenors' complaint satisfies the CR 9(b) particularity requirement as to their fraud claims.

Respondents next argue that they owed no duty to intervenors in the absence of privity or a fiduciary relationship. They point out that no respondent other than the Supply System represented anything directly to the bondholders in the Official Statements and Annual Reports.

[28] While Washington cases allowing recovery for fraud generally involve privity or fiduciary relationships between the parties, allegations of fraud may be asserted where one party to a transaction has a duty to speak because that party possesses superior knowledge yet that party fails to state, or has no basis for, an asserted material fact. *See, e.g., Lincoln v. Keene*, 51 Wn.2d 171, 174, 316 P.2d 899 (1957); *Hamilton v. Mihills*, 92 Wash. 675, 680, 159 P. 887 (1916); *Kaas v. Privette*, 12 Wn. App. 142, 149, 529 P.2d 23 (1974).

Other courts have held defendants liable for concealment or misstatements absent privity when the defendant knows that information will be passed on to the plaintiff or to a class of person who the defendant intends to induce reliance. *See, e.g., Fischer v. Kletz*, 266 F. Supp. 180, 187 (S.D.N.Y. 1967) (where affirmative misrepresentation was involved, accountant was liable regardless of his interest in the transaction); *Bank of Vly. v. Mattson*, 215 Neb. 596, 597-98, 339 N.W.2d 923 (1983) (borrower's fraudulent misrepresentations regarding his finances made to second party constituted fraud on third party plaintiff who was approached by second party to raise money for borrower).

Additionally, while requiring privity, a fiduciary relationship, or a limited class is warranted in negligent misrepresentation cases where a defendant is merely negligent and should not be held potentially liable to an unlimited number of plaintiffs, the same reasoning does not apply where a defendant knowingly makes a misrepresentation.

The Restatement (Second) of Torts provides:

> One who makes a fraudulent misrepresentation is subject to liability to the persons or class of persons *whom he intends or has reason to expect to act or to refrain from action* in reliance upon the misrepresentation, for pecuniary loss suffered by them through their justifiable reliance in the type of transaction in which he intends or has reason to expect their conduct to be influenced.

(Italics ours.) Restatement § 531.

> The maker of a fraudulent misrepresentation is subject to liability for pecuniary loss to another who acts in justifiable reliance upon it if the misrepresentation, although not made directly to the other, *is made to a third person and the maker intends or has reason to expect that its terms will be repeated or its substance communicated to the other, and that it will influence his conduct in the transaction* or type of transaction involved.

(Italics ours.) Restatement § 533.

> (1) One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose, if, but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question.
>
> (2) One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated,
>
> (a) matters known to him that the other is entitled to know because of a fiduciary or other similar relation of trust and confidence between them; and
>
> (b) matters known to him that he knows to be *necessary to prevent his partial or ambiguous statement of the facts from being misleading; and*
>
> * * *

> (e) *facts basic to the transaction*, if he knows that the other is about to enter into it under a mistake as to them, and that the other, because of the relationship between them, the customs of the trade or other objective circumstances, *would reasonably expect a disclosure of those facts.*

(Italics ours.) Restatement § 551. Thus, while a duty in a fraud case may be owed by a defendant to plaintiffs in privity, a fiduciary relationship, or a limited class of persons, a duty may also arise to those third persons whom the defendant intends or has reason to expect will receive the information, especially in a business transaction where a defendant has knowledge necessary to prevent misrepresentation, or facts basic to the transaction where the plaintiff would reasonably expect disclosure.

Here, with the trial court's CR 12(b)(6) dismissal in mind, we assume that respondents gave information to the Supply System knowing or intending that the Supply System would pass the information onto the intervenors in the Official Statements and Annual Reports. The respondents also have superior knowledge of facts basic to the transaction which they knew or reasonably should have expected intervenors to expect disclosure. Thus, respondents may have owed a duty to intervenors even absent privity or a fiduciary relationship.

VII

Consumer Protection Act Claims

Intervenors challenge the trial court's dismissal of their Consumer Protection Act (CPA), RCW 19.86, claims against respondent professionals, irrigation districts and rural electric cooperatives. Intervenors concede that the remaining respondents are exempt from the CPA as municipal corporations or political subdivisions of the state. *See Washington Natural Gas Co. v. PUD 1*, 77 Wn.2d 94, 98, 459 P.2d 633 (1969).

A

Respondent Professionals

[29] The trial court held that intervenors' allegations of unfair and deceptive acts or practices in connection with the sale of bonds by respondent professionals failed to state a claim under the CPA as interpreted by this court in *Short v. Demopolis*, 103 Wn.2d 52, 61, 691 P.2d 163 (1984). In *Short*, this court held that the term "trade or commerce" used by the CPA only includes the entrepreneurial or commercial aspects of the professional practice of law, not the substantive quality of services provided. Claims "directed to the competence of and strategy employed" by attorneys constitute allegations of negligence or malpractice in performing professional services and, as such, are not actionable under the CPA. *Short*, at 61.

Intervenors do not dispute that *Short* is applicable to the respondent professionals here. Rather, the intervenors contend that their claims amount to allegations of unfair or deceptive acts in the entrepreneurial aspects of the professionals' businesses. We disagree.

Intervenors allege that all professionals rendered services negligently to the Supply System. The intervenors do not challenge the professionals' fee rates, billing or client relationships. We conclude that because intervenors' allege only negligence or malpractice against the respondent professionals, they do not state a claim under the CPA. Intervenors' bald assertions that the respondent investment advisors were, by definition, engaged in entrepreneurial aspects of their business are without merit. In their professional malpractice claims against the respondent advisors, intervenors attack the advisors' exercise of professional judgment, not the entrepreneurial aspects of their services. Therefore, we affirm the trial court's dismissal of intervenors' CPA claims against respondent professionals.

B

Irrigation Districts

Intervenors claim that because respondent irrigation districts perform no governmental functions, they are not municipal corporations exempt from the CPA. Intervenors rely on *State v. Human Relations Research Found.*, 64 Wn.2d 262, 266, 391 P.2d 513 (1964). In *Human Relations*, however, the question whether an irrigation district was a municipal corporation was not before the court; rather, the court was faced with the issue of the district's interest in compensation for state condemnation of its land. In this context the court reasoned that the district was entitled to compensation for the condemnation because it performed no governmental function. *Human Relations*, at 266.

[30] Other cases hold that irrigation districts are undeniably municipal corporations created by the Legislature for a public purpose. *See State ex rel. Clancy v. Columbia Irrig. Dist.*, 121 Wash. 79, 84, 208 P. 27 (1922); *In re Columbia Irrig. Dist.*, 183 Wash. 425, 437, 48 P.2d 648 (1935); *Outlook Irrig. Dist. v. Fels*, 176 Wash. 211, 219, 28 P.2d 996 (1934); *Washington Nat'l Inv. Co. v. Grandview Irrig. Dist.*, 175 Wash. 644, 648, 28 P.2d 114 (1933); *Roberts v. Richland Irrig. Dist.*, 169 Wash. 156, 160, 13 P.2d 437 (1932), *aff'd*, 289 U.S. 71 (1933); *Richland Irrig. Dist. v. De Bow*, 149 Wash. 242, 246, 270 P. 816 (1928); *Burbank Irrig. Dist. 4 v. Douglass*, 143 Wash. 385, 396, 255 P. 360, 259 P. 881 (1927); *Peters v. Union Gap Irrig. Dist.*, 98 Wash. 412, 414, 167 P. 1085 (1917); *Brown Bros. v. Columbia Irrig. Dist.*, 82 Wash. 274, 283-84, 144 P. 74 (1914); *Roza Irrig. Dist. v. State*, 80 Wn.2d 633, 634, 497 P.2d 166 (1972). Therefore, we conclude that respondent irrigation districts are municipal corporations and, as such, are exempt from the CPA under *Washington Natural Gas Co. v. PUD I*, *supra* at 98.

C

Rural Electric Cooperatives

Intervenors take exception to the trial court's conclusion that because rural electric cooperatives are otherwise regulated, they are exempt from the CPA. The CPA exempts "transactions permitted by any other regulatory body". RCW 19.86.170. *See Tokarz v. Frontier Fed. Sav. & Loan Ass'n*, 33 Wn. App. 456, 464 n.5, 656 P.2d 1089 (1982). The Rural Electrification Administration (REA), a federal agency, closely monitors and extensively controls the acts of rural electric associations borrowing money from the REA. *In re Dairyland Power Coop.*, 37 F.P.C. 12, 18 (1967). Here, however, the record contains no assertion that any of the respondent electrical associations were Administration borrowers and therefore subject to such control by the REA.

[31] Nevertheless, as the rural electric cooperatives, like the respondent PUD's and municipal utilities, are nonprofit, consumer-owned utilities serving those who reside within their service areas, there exists no public policy reason as expressed by the CPA why the cooperatives should not be likewise exempt from the CPA. Moreover, these entities allegedly violated the CPA only by virtue of their relationship with the Supply System, which is exempt from the CPA. We conclude that to subject the respondent rural electric cooperatives to potential CPA liability would be contrary to the Legislature's purpose in excluding municipal corporations from liability under the CPA. Therefore, we hold in light of the unique facts of this case that, like the Supply System and other governmental entities admittedly exempt from the CPA, respondent rural electric cooperatives are also exempt from the CPA under our reasoning in *Washington Natural Gas Co. v. PUD 1, supra at* 98. We affirm the trial court's dismissal of intervenors' CPA claims against respondents.

VIII

Amendment of Complaint

Although plaintiffs agree with the trial court's ruling allowing them to amend their original complaint to add new plaintiffs, they challenge the trial court's refusal to allow those new plaintiffs' claims to relate back to the original filing date for statutes of limitation purposes.

Respondents argue, and the trial court held, that CR 15(c) applies only to the relation back of claims against newly added defendants, not newly added plaintiffs. We disagree.

CR 15(c) provides:

> (c) **Relation Back of Amendments.** Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

The advisory committee note to Fed. R. Civ. P. 15(c) from which CR 15(c) was derived, states that rule 15(c) extends by analogy to plaintiffs. *See* Advisory Committee Note to the 1966 amendment to rule 15(c), 39 F.R.D. 82-84 (1966); 3 J. Moore, *Federal Practice* ¶ 15.15[4.2], at 15-169 [2d ed. 1985]; 6 C. Wright & A. Miller, *Federal Practice* § 1501, at 524 (1971). We find these comments persuasive.

[32] Respondents argue that to allow new plaintiffs' claims to relate back in this case would amount to granting them a new cause of action after the applicable statutes of limitations had run. Since the amendment of CR 15(c), however, we have rejected this argument. Indeed, once the

notice and prejudice requirements of CR 15(c) have been met, any amendment does not subvert the policies of the statute of limitations. *North St. Ass'n v. Olympia*, 96 Wn.2d 359, 368, 635 P.2d 721 (1981). "Rule 15(c), as amended, dovetails with the policies of the limitation statutes." *North St. Ass'n*, at 368. Moreover, "[a]s long as a defendant is fully apprised of a claim arising from specific conduct and has prepared to defend the action against him, he will not be prejudiced by the addition of a new plaintiff and thus should not be allowed to raise a limitations defense." 6 C. Wright & A. Miller, *Federal Practice* § 1501, at 272 (Supp. 1986).

Thus, we conclude that the notice and prejudice principles contained in CR 15(c) extend by analogy to the relation back of amendments adding new plaintiffs. Thus, a court must determine whether the requirements of CR 15(c) are met and the court must determine whether failure to join the plaintiffs earlier was the result of inexcusable neglect. *See South Hollywood Hills Citizens Ass'n v. King Cy.*, 101 Wn.2d 68, 77, 677 P.2d 114 (1984).

Plaintiffs also challenge the trial court's denial of their request to amend their complaint to add defendants. Plaintiffs sought to add as parties several directors and officers of respondent R. W. Beck and Associates, Raytheon Company as parent corporation of respondent United Engineers, and Enserch Corporation as owner of respondent Ebasco Services. The trial court held that plaintiffs' failure to join these defendants was the result of inexcusable neglect.

[33] Plaintiffs contend that delay, excusable or not, is not sufficient to support the trial court's denial of their motion. Instead, plaintiffs argue that a showing of specific prejudice by the nonmoving party must be shown. *See Caruso v. Local 690, Int'l Bhd. of Teamsters*, 100 Wn.2d 343, 349, 670 P.2d 240 (1983) (delay alone insufficient to support denial of leave to amend to add new claims). However, in cases where leave to amend to add additional defendant has been sought, this court has clearly held that inexcusable neglect alone is a sufficient ground for denying the motion. *North St. Ass'n*, at 368; *Tellinghuisen v. King Cy.*, 103 Wn.2d 221, 223, 691 P.2d 575

(1984); *South Hollywood Hills Citizens Ass'n v. King Cy., supra* at 77. Generally, inexcusable neglect exists when no reasons for the initial failure to name the party appears in the record. *South Hollywood Hills Citizens Ass'n*, at 78. If the parties are apparent, or are ascertainable upon reasonable investigation, the failure to name them will be held to be inexcusable. *See* 3A L. Orland, Wash. Prac., comment § 5185, at 43-44 (3d ed. 1986 Supp.); *Tellinghuisen*, at 224 (no excuse where identity of omitted parties was matter of public record); *South Hollywood Hills Citizens Ass'n*, at 77 (no excuse because identity of omitted parties was matter of public record).

Here, plaintiffs only contend that they could not have discovered the identity of the defendants earlier. The record does not indicate plaintiffs' reasons. Nevertheless, the record shows that the identities of all the defendants sought to be added was readily available to plaintiffs from a variety of public sources. See, *e.g.*, Clerk's Papers, at 867 (outlining public documentation of respondent Ebasco's ownership by proposed new defendant Enserch); Plaintiffs' Supplemental Clerk's Papers, at 20 (detaining proposed new defendant Raytheon's ownership of respondent United Engineers); Clerk's Papers, at 779 (setting out annual reports filed with Washington Secretary of State identifying proposed new defendant officers and directors of respondent R. W. Beck and Associates, Inc.).

Plaintiffs' failure to avail themselves of this information prior to their third amended complaint, without evidence in the record to the contrary, supports the trial court's conclusion that plaintiffs' failure to name these defendants originally was the result of inexcusable neglect. Therefore, the trial court did not abuse its discretion in denying plaintiffs' request for leave to amend its complaint to include additional defendants.

IX

Service of Process

Plaintiffs challenge the trial court's dismissal of defendants Donald Patterson and Stanley Pardo on the basis of defective service of process. Patterson is a former officer of respondent Blyth, Eastman, Paine, Webber, Inc.; Pardo is presently an officer of respondent Paine Webber, Inc.

A civil action in the superior court is commenced by service of a copy of a summons, together with a copy of the complaint, as provided in CR 4. *See* CR 3. RCW 4.28.080 details the appropriate method of service of process for specific types of defendants. RCW 4.28.080(14), which describes the proper method of service for all defendants not specifically covered in sections 1-13, provides for service as follows:

> In all other cases, to the defendant personally, or by leaving a copy of the summons at the house of his usual abode with some person of suitable age and discretion then resident therein.

Concerning personal service *out-of-state*, which is applicable in the present situation, CR 4(e)(2) provides:

> Although rule 4 does not generally apply to personal service out of state, the prescribed form of summons may, with the modifications required by statute, be used for that purpose. See RCW 4.28.180.

RCW 4.28.180 provides:

> Personal service out of state. Personal service of summons or other process may be made upon any party outside the state. If upon a citizen or resident of this state or upon a person who has submitted to the jurisdiction of the courts of this state, it shall have the force and effect of personal service within this state; otherwise it shall have the force and effect of service by publication. The summons upon the party out of the state shall contain the same *and be served in like manner as personal summons within the state*, except it shall require the party to appear and answer within sixty days after such personal service out of the state.

Proof of service is provided for in CR 4(g) which states in relevant part:

> Proof of service shall be as follows:
>
> . . .
>
> (6) In case of personal service out of the state, the affidavit of the person making the service, sworn to before a notary public, with a seal attached, or before a clerk of a court of record.

While the affidavit of service, regular in form and substance, is presumptively correct, the return is subject to attack and may be discredited by competent evidence. *Lee v. Western Process Co.*, 35 Wn. App. 466, 469, 667 P.2d 638 (1983). Affidavits sworn to by individuals purportedly served asserting that they were not in fact personally served are considered by the courts as competent evidence discrediting averments to the contrary in affidavits of service. *See, e.g., Lee*, at 469.

Here, at the time service was purportedly made on his wife at his residence, neither Patterson nor his wife was at home. While Patterson's wife was allegedly served at home in New Jersey on August 15, 1984, she was in fact vacationing in Massachusetts from July 4, 1984, to September 2, 1984. See Affidavit of Jane Patterson; Clerk's Papers, at 1517. Moreover, Patterson was not at home any time between August 12, 1984, and August 19, 1984. See Affidavit of Donald Patterson; Clerk's Papers, at 1513. Patterson only discovered the summons and complaint when he returned home to find them on his porch, Clerk's Papers, at 1514, and has no recollection of receiving the copies purportedly mailed to him, Clerk's Papers, at 1515.

Plaintiffs affidavit of service on Pardo demonstrates defective service on its face, purporting to have served his personal secretary at his usual place of business on August 13, 1984, rather than at his residence. Additionally, Pardo's personal secretary has no recollection of the service at his place of business. See Affidavit of Sharon O'Reilly; Clerk's Papers, at 1524. No attempt was made to serve Pardo at his residence. Pardo discovered the summons and complaint among the mail

at his office sometime subsequent to August 13, 1984. See Affidavit of Stanley Pardo; Clerk's Papers, at 1521.

Plaintiffs do not dispute the Patterson and Pardo affidavits. Instead, they contend that their service of process constituted substantial compliance with procedural rules because both Patterson and Pardo eventually received notice of their suit. We disagree.

[34] Initially, we observe that mere receipt of process and actual notice alone do not establish valid service of process. *See Spokane v. Department of Labor & Indus.*, 34 Wn. App. 581, 584, 663 P.2d 843, *review denied*, 100 Wn.2d 1007 (1983). Moreover, substantial compliance with out-of-state service requirements has been recognized only where the defect in service involved a late filing of nonresidency affidavits as required by RCW 4.28.185(4). *See Golden Gate Hop Ranch, Inc. v. Velsicol Chem. Corp.*, 66 Wn.2d 469, 472, 403 P.2d 351 (1965), *cert. denied*, 382 U.S. 1025 (1966); *Ryland v. Universal Oil Co.*, 8 Wn. App. 43, 45, 504 P.2d 1171 (1972); *Hatch v. Princess Louise Corp.*, 13 Wn. App. 378, 379, 534 P.2d 1036 (1975).

Here, the service was more than technically defective; the statutory procedures to ensure proper notice to nonresident defendants were not followed. As statutes authorizing service on out-of-state parties are in derogation of common law personal service requirements, they must be strictly pursued. *See State ex rel. Hopman v. Superior Court*, 88 Wash. 612, 617, 153 P. 315 (1915) (comparing out-of-state service statutes to service by publication).

The Washington long-arm statute was clearly not strictly pursued in the instant case. Mr. Patterson was *not* personally served, nor was the process delivered to a person of suitable age or discretion at his home. Rather, the summons and complaint were left outside the door of his house at a time when no one was present. Likewise, service upon Mr. Pardo was neither made upon him personally, nor upon a person of suitable age or discretion at his home. Rather, the summons and complaint were either mailed to him, or dropped off at his place of business.

Finally, plaintiffs contend that service was made pursuant to the trial court's order granting plaintiffs leave to serve their third amended complaint on counsel for all defendants appearing in this action. Plaintiffs argue that because they served the complaint on Patterson and Pardo's counsel pursuant to that order, service was properly made pursuant to CR 4(e)(1) (providing that service may be made in manner prescribed by court order providing for service of summons and complaint).

Plaintiffs' argument is without merit. Voluntary appearances by defendants do not preclude their rights to challenge sufficiency of service pursuant to CR 12(b). CR 4(d)(5); *Adkinson v. Digby, Inc.*, 99 Wn.2d 206, 209, 660 P.2d 756 (1983). Moreover, the trial court's order allowing service of the third amended complaint did not provide for service of a summons. See Clark's Papers, at 993. Thus, the order does not fall within the scope of CR 4(e)(1), and does not negate the original defective service.

We conclude that the trial court properly dismissed defendants Patterson and Pardo.

CONCLUSION

For the reasons stated in our foregoing analysis, we reverse the trial court's judgment as to plaintiffs' and intervenors' claims under the Securities Act of Washington and intervenors' common law fraud and negligent misrepresentation claims. We also reverse the trial court's denial of plaintiffs' motion to allow the claims of newly added plaintiffs to relate back to the original filing date of this action. The trial court's judgment as to all remaining claims is affirmed.

We remand this case to the trial court for further proceedings consistent with this opinion.

UTTER, DORE, GOODLOE and DURHAM, JJ., and WETHERALL, J. Pro Tem., concur.

PEARSON, C.J. (dissenting)—I would affirm the trial court's dismissal of all plaintiffs' and intervenors' Washington State Securities Act (WSSA) claims pursuant to CR 12(b)(6),

as none of the complaints assert the necessary privity required to establish an action under RCW 21.20.430(1). Further, the majority has, in my opinion, misapplied the Restatement of Torts section 552 to allow the intervenors' negligent misrepresentation claims to stand. Therefore, I dissent.

I

WASHINGTON STATE SECURITIES ACT CLAIMS

A

Proper Construction of the WSSA

First and foremost, the reasonable interpretation of RCW 21.20.430(1) requires privity between plaintiff and defendant. The majority's expansive denomination of parties liable in a private action is without basis under the clear language of the WSSA.

This court interprets statutory language to implement legislative intent. *Seven Gables Corp. v. MGM/UA Entertainment Co.*, 106 Wn.2d 1, 6, 721 P.2d 1 (1986). The authoritative indicator of legislative intent is the plain and unambiguous meaning of the words in a statute. *State v. Johnson*, 104 Wn.2d 179, 181, 703 P.2d 1052 (1985). When the language of a statute is clear, the court must respect its ordinary meaning. *People's Org. for Wash. Energy Resources v. Utilities & Transp. Comm'n*, 104 Wn.2d 798, 825, 711 P.2d 319 (1985). The ordinary and clear meaning of "is liable to the person buying the security from him or her" in RCW 21.20.430(1) requires that the plaintiff bought a security from the defendant—that is, privity. Although the Washington Legislature has substantially altered section .430 during the ongoing development of numerous § 12(2) interpretations in the federal circuits, the original language in subsection .430(1) requiring privity remains intact. The majority ignores that legislative intent can be implemented only by retaining the plain meaning of that subsection.

Also, including only actual sellers under subsection .430(1) retains the net of liability obviously contemplated by the scheme of section .430. We interpret statutory language to render all sections meaningful. *State v. Q.D.*, 102 Wn.2d 19, 23, 685 P.2d 557 (1984). Only a strict privity approach ensures meaningful application of all portions of section .430; the majority's substantial factor-proximate cause approach renders subsection .430(3) repetitious and meaningless. For example, under the majority's interpretation an employee who falls under subsection .430(3) because he or she materially aids in the sale also necessarily falls under subsection .430(1) as a substantial factor causing the sale. Under a privity approach, however, the party who actually sold the security to the plaintiff is liable under subsection .430(1), and in subsection .430(3) the Legislature specifically delineated other parties liable by virtue of their status, knowledge, and participation in the sale, such as employees who materially aid.[2] Hence, the privity plainly required under the reasonable construction of the WSSA language avoids rendering subsection .430(3) superfluous.

Furthermore, the majority's comparison to the comments of the Uniform Securities Act is without merit. Our Legislature has not espoused that act and its comments in any part; indeed, only two states have adopted the act, and then with numerous variations. Unif. Sec. Act (1985), 7B U.L.A. 30 (Supp. 1987). Whether other states will adopt the act is not only speculative but improbable, because both the American Bar Association and the North American Securities Administrators Association

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[2] RCW 21.20.430(3) provides:

"Every person who directly or indirectly controls a seller or buyer liable under subsections (1) or (2) above, every partner, officer, director or person who occupies a similar status or performs a similar function of such seller or buyer, every employee of such a seller or buyer who materially aids in the transaction, and every broker-dealer, salesperson, or person exempt under the provisions of RCW 21.20.040 who materially aids in the transaction is also liable jointly and severally with and to the same extent as the seller or buyer, unless such person sustains the burden of proof that he or she did not know, and in the exercise of reasonable care could not have known, of the existence of the facts by reason of which the liability is alleged to exist. There is contribution as in cases of contract among the several persons so liable."

criticized and refused to endorse it. *See* 19 Sec. Reg. & L. Rep. (BNA) 264 (1987); 18 Sec. Reg. & L. Rep. (BNA) 399 (1986).

The majority's reliance on tort law is also inappropriate and without merit. The question of the existence of a *statutory* cause of action is one of statutory construction; the majority's argument based on tort principles, therefore, is entirely misplaced. *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568, 61 L. Ed. 2d 82, 99 S. Ct. 2479 (1979); *SEC v. Seaboard Corp.*, 677 F.2d 1289, 1294 n.4 (9th Cir. 1982). The WSSA does not supplant or mirror tort law remedies available to an injured party in a securities transaction. *Accord, Ging v. Parker-Hunter, Inc.*, 544 F. Supp. 49, 52 (W.D. Pa. 1982). In fact, the securities laws were created specifically to regulate a unique aspect of commerce that no other area of law touches upon, including common law tort. *See Bowden v. Robinson*, 67 Cal. App. 3d 705, 712, 136 Cal. Rptr. 871 (1977). It is for this very reason that the intervenors' common law negligent misrepresentation and fraud claims are treated and analyzed as actions separate from the WSSA claims.

B

Interpretation Mirroring Section 12(2)

The majority incorrectly imposes a meaning on the WSSA that allegedly mirrors the current federal circuit court trend in interpreting § 12(2) of the Securities Act of 1933, 15 U.S.C. § 77*l*(2) (1982). Although this court must not interfere with federal enforcement of the 1933 and 1934 securities acts, we need not interpret the WSSA in a duplicate manner. *Kittilson v. Ford*, 93 Wn.2d 223, 227, 608 P.2d 264 (1980).

Mirrored interpretation is improper because the purposes of the federal securities acts differ sharply from the purpose of the WSSA. Federal securities laws enforce disclosure and maintain integrity in the secondary securities markets, while the WSSA protects investors. Enforcement of the latter purpose is the only proper "broad remedial purpose" pursuant to which the WSSA should be interpreted. *See Garretson v. Red-Co.*,

Inc., 9 Wn. App. 923, 927-28, 516 P.2d 1039 (1973) (primary function of court is to carry out the legislative purpose of the WSSA); *see also Touche Ross & Co. v. Redington*, 442 U.S. at 578 ("generalized references to the "remedial purposes" of the 1934 Act will not justify reading a provision "more broadly than its language and the statutory scheme reasonably permit." *SEC v. Sloan*, 436 U.S. 103, 116 (1978); see *Ernst & Ernst v. Hochfelder*, 425 U.S., at 200."). For this reason, we have in past cases employed the WSSA solely to enforce honesty in direct dealings between individuals. *See e.g., McClellan v. Sundholm*, 89 Wn.2d 527, 534, 574 P.2d 371 (1978); *Clausing v. DeHart*, 83 Wn.2d 70, 73, 515 P.2d 982 (1973); *Kaas v. Privette*, 12 Wn. App. 142, 150, 529 P.2d 23 (1974). In fact, research has revealed no jurisdiction that granted a state securities cause of action in a situation involving no direct dealings in a firm commitment underwriting issue. Wrongful actions based on such a large-scale issue and impersonal transaction are properly redressed under the federal securities acts.

Mirrored interpretation is also improper because the scheme and express limitations of RCW 21.20.430 differ from those in § 12(2). For example, the § 12(2) statute of limitations would preclude this suit. 15 U.S.C. § 77m (1982). A government issuer such as the Supply System is not subject to suit under § 12(2); see majority opinion, at 122-24. Also, other than "sellers", Congress provided for liability only of "control persons" under § 12(2). 15 U.S.C. § 77*o* (1982). By contrast, other than those in privity, the Washington Legislature explicitly provided for liability of several participants in the sale: partners, directors, or employees who materially aid, for example. RCW 21.20.430(3). These differences reveal that although interpretations of § 12(2) may provide guidance, mirrored construction is patently misplaced and irresponsive to the WSSA.

Even under the federal § 12(2) standard proposed by the majority, no defendants would be liable because the complaints contain no allegations that a defendant actually negotiated a particular buy-sell transaction, or was even remotely involved

with the actual sellers, the underwriters.[3] Courts adopting the substantial participation-proximate cause test espoused by the majority limit liability to those actually participating in the particular sales transaction and preclude suit against those merely involved in preparing reports and offering circulars:

> The plaintiffs here merely allege that the individual defendants participated in preparing the Registration Statement and Prospectus and certain financing mechanisms; they do not allege any substantial participation by the individual defendants in the particular sales transactions. On this ground, the court will grant the defendants' motion to dismiss the plaintiffs' § 12(2) claims against the individual defendants.

In re Diasonics Sec. Litig., 599 F. Supp. 447, 458 (N.D. Cal. 1984), *quoted in In re Victor Technologies Sec. Litig.*, [1986-1987 Transfer Binder] Blue Sky L. Rep. (CCH) ¶ 72,491 (N.D. Cal.); *see Hudson v. Capital Management Int'l, Inc.*, [1982-1983 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 99,222 (N.D. Cal.) (allegation that defendants offered opinions in sales circulars or directly disseminated information to investors is not adequate pleading of § 12(2) seller status); *Stokes v. Lokken*, 644 F.2d 779, 785 (8th Cir. 1981) (attorney's opinion letter, upon which auditor relied in issuing report for advertising materials, did not "approach the degree of participation required for liability under § 12"). For this reason, the participation test espoused by the majority is sometimes referred to as a "loose privity" standard. *In re Wicat Sec. Litig.*, 600 F. Supp. 1236, 1239 (D. Utah 1984).

The complaints at bench pertain to preparation of the prospectus and annual reports, and issuance of opinion letters — activities insufficient as a matter of law to constitute the

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[3] Indeed, the continued validity of the circuits' expansion on the plain meaning of "seller" in § 12(2) is doubtful in light of recent federal cases limiting private actions under the securities acts. *SEC v. Seaboard Corp.* 677 F.2d 1289, 1294 nn. 3 & 4 (9th Cir. 1982) (noting "the doubtful nature" of the "participant theory" espoused in *SEC v. Murphy*, 626 F.2d 633 (9th Cir. 1980) and cited as authority by a majority of this court, in light of recent Supreme Court cases prescribing "a strict statutory construction approach to the securities acts.")

"substantial participation-proximate cause" in a particular buy-sell transaction. Indeed, a purchaser may never sue an issuer under § 12(2) in a firm commitment underwriting Arrangement such as the WNP 4 and 5 bond issues; in such an instance, "even under the loosest privity standard", the proper defendant is the actual seller, the underwriter. *In re Wicat Sec. Litig.*, at 1242; *see In re Fortune Sys. Sec. Litig.*, 604 F. Supp. 150, 163 (N.D. Cal. 1984). Thus, even under the modern view of the federal "participation" approach adopted by the majority, plaintiffs' and intervenors' complaints should be dismissed.

C

Interpretations of Other State Securities Acts

My examination of interpretations of other state securities acts confirms that the Legislature intended to require privity under the WSSA. The majority determines that other courts' interpretations of state securities acts are "inconclusive" toward interpreting the WSSA. Majority opinion, at 129. On the contrary, the methodology employed by other courts provides insightful direction. As a general rule, other courts strictly construe state statutes according to their plain language. The majority unfortunately chooses to ignore this logical methodology.

State courts require the plaintiff to establish privity with the defendant to state a cause of action under acts with language similar to subsection .430(1)'s "Any person, who offers or sells a security in violation . . . is liable to the person buying the security from him or her". For example, in California the words "any person acquiring from him" require privity as a condition of recovery. *Bowden v. Robinson*, 67 Cal. App. 3d 705, 712, 136 Cal. Rptr. 871 (1977). In Oklahoma the term "any person who offers or sells" also requires strict privity as a condition of recovery. *Nikkel v. Stifel, Nicolaus & Co.*, 542 P.2d 1305, 1307-08 (Okla. 1975). In Texas, it appears that a defendant who does anything less than negotiate the sale of stock is not a seller "liable to the person buying the security from him". *Stone v. Enstam*, 541 S.W.2d 473, 480 (Tex. Ct. App. 1976); *see also Huddleston v. Herman & MacLean*, 640

F.2d 534, 551 (5th Cir. 1981) (interpreting *Stone v. Enstam, supra*, as limiting state securities actions to these actions against one engaged in the sale process and never including purchases on the open market not from the defendant), *rev'd in part on other grounds in* 459 U.S. 375, 74 L. Ed. 2d 548, 103 S.Ct. 683 (1983). The court in *Anders v. Dakota Land & Dev. Co.*, 380 N.W.2d 862 (Minn. Ct. App. 1986) denied a state securities action, although it did adopt a definition of "seller" identical to a federal interpretation of § 12(2). *Anders*, at 868. A later Minnesota case, however, implicitly limits the *Anders* interpretation *by* refusing to grant an action against a defendant not the agent of a seller in privity. *Norwest Bank Hastings v. Clapp*, 394 N.W.2d 176, 178 (Minn. Ct. App. 1986). The *Norwest Bank Hastings* court determined that the seller's lender, who did not work for the seller in privity but who through his contact and advice to the buyer instrumentally influenced the decision to purchase, was not liable under the portion of the statute holding a "seller's" agent who materially aids liable. *Norwest*, at 178.

State courts expanding upon the privity approach do so pursuant to strict interpretation of statutory language that holds liable those who "participate" or "materially aid" in the fraudulent sale, unlike the WSSA language. These courts do not rely on federal circuit court trends in interpreting the federal securities acts; rather, they reasonably interpret statutory language in reaching their conclusions. *E.g., Fakhrdai v. Mason*, 72 Or. App. 681, 684, 696 P.2d 1164 (1985); *Froehlich v. Matz*, 93 Ill. App. 3d 398, 408-09, 417 N.E.2d 183 (1981). The WSSA only holds sellers in privity liable; no "participants" are subject to suit under subsection .430(1). Hence, the majority's expansion of the WSSA liability section is clearly unsupported by other states' interpretations of their acts.

When federal courts exercising pendent jurisdiction recognize that state acts should be construed not as a mirror of federal § 12(2) but with respect to their unique purpose and language, they generally employ a plain meaning interpretation. Hence, many federal courts construing statutes similar to the WSSA interpret those acts as requiring privity, regardless of their interpretation of federal § 12(2). *E.g., SEC*

v. Seaboard Corp., 677 F.2d 1289, 1295-96 (9th Cir. 1982) (allowing suit against participants as potentially liable "sellers" under § 12(2), but precluding suit absent privity under the California State Securities Act); *In re Victor Technologies Sec. Litig.*, [1986-1987 Transfer Binder] Blue Sky L. Rep. (CCH) ¶ 72,491 (N.D. Cal.) (holding actual participants in the selling process liable under § 12(2), but requiring "strict privity" under the California State Securities Act); *see also Sharp v. Coopers & Lybrand*, 649 F.2d 175, 192 (3d Cir. 1981) (accountant who issued opinion letter used in sales program not liable under Pennsylvania Securities Act because accountant was not the actual seller), cert. denied, 455 U.S. 938 (1982); *Fickinger v. C.J. Planning Corp.*, 556 F. Supp. 434, 436 (E.D. Pa. 1982) (privity required under Pennsylvania Securities Act; hence advisor and parent company not liable under the act for alleged misrepresentations and omissions because they did not actually sell the security to the plaintiff). Hence, the majority's expansion of the WSSA liability section is unsupported by federal court interpretations of state securities laws.

D

Conclusion

I would interpret the WSSA to enforce its plain meaning, affording a civil action to purchasers only against the sellers from whom they purchased. This construction enforces the unique purpose of the WSSA and renders all sections meaningful. The majority's interpretation that mirrors § 12(2) is misplaced in light of the unique purpose, language, and scheme of the WSSA.

Also, the complaints should be dismissed even under the federal test adopted by the majority. No allegation asserts that a defendant participated in a particular sales transaction to a particular plaintiff; indeed, such an allegation is impossible because the WNP 4 and 5 bonds were sold pursuant to a firm commitment underwriting arrangement. In addition, interpretations of other state securities acts should provide us with guidance; when examined, they are construed according to their

plain language. A similar approach is appropriate for the WSSA.

The allegations at bench which do not assert that a defendant had any connection to the actual sellers, the underwriters, should not withstand defendants' motion to dismiss. I therefore would affirm the trial court's CR 12(b)(6) dismissal of the WSSA claims.

II

Intervenors' Negligent Misrepresentation Claim

Proper application of section 552 precludes the intervenors' negligent misrepresentation claim. I therefore dissent from that portion of the majority opinion reversing the trial court's dismissal of the negligent misrepresentation claim.

In determining whether a cause of action for negligent misrepresentation will lie, jurisdictions differ on the scope of the duty owed to the plaintiffs. The minority of courts follow the "foreseeability" approach. *See, e.g., International Mortgage Co. v. John P. Butler Accountancy Corp.*, 177 Cal. App. 3d 806, 820, 223 Cal. Rptr. 218 (1986); *Citizens State Bank v. Timm, Schmidt & Co., S.C.*, 113 Wis. 2d 376, 386, 335 N.W.2d 361 (1983). Liability under the foreseeability approach extends to all "reasonably foreseeable" plaintiffs who relied on the negligent misrepresentations. *International Mortgage*, at 820; *Citizens State Bank*, at 386.

A majority of courts, however, criticize the foreseeability approach and follow the Restatement (Second) of Torts § 552 (1977). These courts refuse to impose liability on a limitless group of potential plaintiffs when the defendant is merely negligent. *In re Consumers Power Co. Sec. Litig.*, 105 F.R.D. 583, 596-98 (E.D. Mich. 1985).

> When there is no intent to deceive but only good faith coupled with negligence, the fault of the maker of the misrepresentation is sufficiently less to justify a narrower responsibility for its consequences.

Restatement (Second) of Torts § 552, comment *a* (1977). *See also* Restatement (Second) of Torts § 552, comment *h* (1977) (persons liable under section 552 are "distinct from the much larger class who might reasonably be expected sooner or later to have access to the information and foreseeably to take some action in reliance upon it"). Hence, liability under section 552 is limited to loss suffered "by the person or one of a *limited group* of persons *for whose benefit and guidance he intends to supply* the information or knows that the recipient intends to supply it." (Italics mine.) Restatement (Second) of Torts § 552(2)(a) (1977). This court adheres to the Restatement (Second) of Torts § 552 (1977). *Transamerica Title Ins. Co. v. Johnson*, 103 Wn.2d 409, 415, 693 P.2d 697 (1985); *see also Wilber v. Western Properties*, 22 Wn. App. 458, 463, 589 P.2d 1273 (1979).

The majority correctly affirms that section 552 defines the scope of the duty owed a plaintiff in Washington who is suing for negligent misrepresentation. In my opinion, however, the court then incorrectly applies section 552 to the pleadings in this case. As a matter of law, section 552 precludes the intervenors' action for negligent misrepresentation.[4]

Section 552 precludes suit for negligent misrepresentation when the defendant merely conveys information to a limitless and unrestricted class of investors. In such a situation, courts find a duty only if they reject section 552 and adopt the foreseeability approach. *E.g., International Mortgage Co. v. John P. Butler Accountancy Corp.*, 177 Cal. App. 3d at 820 (under the section 552 approach, accountant who negligently prepared financial statements for firm was not liable to purchasers of firm's stock who relied on statements; accountants were potentially liable under the foreseeability approach); *Citizens State Bank v. Timm, Schmidt & Co., S.C.*, 113 Wis. 2d at 386 (under the section 552 approach, accountant who negligently prepared auditing statements for corporation was

[4] Admittedly, under illustration 6 of section 552, the situation at bench could be construed to fall within the ambit of section 552. As applied, however, no court following section 552 allows suit when information is conveyed to a limitless and unrestricted class of potential investors, as was the case at bench.

not liable to party who relied on statements in loaning money to corporation; accountants were liable under the foreseeability approach). Absent a known and limited number of relying parties, those courts adhering to section 552 and rejecting the foreseeability approach preclude an action altogether. *E.g.*, *Credit Alliance Corp. v. Arthur Andersen & Co.*, 65 N.Y.2d 536, 553, 493 N.Y.S.2d 435 (1985) (accountants liable to a known relying party, but not to "any foreseeable plaintiff"); *Briggs v. Sterner*, 529 F. Supp. 1155, 1177 (S.D. Iowa 1981) (accountants not liable to foreseeable investors; court follows section 552 and refuses to hold accountants liable because plaintiff investors were not actually known and were of an unlimited class at the time the statements were prepared — "the risk to be perceived at the time of the undertaking defines the nature of the duty of ordinary care owed to third parties."); *see Milliner v. Elmer Fox & Co.*, 529 P.2d 806, 808 (Utah 1974) (accountant who prepared statements for corporation was not liable to purchasers of stock under approach similar to section 552, requiring that accountant knew that "particular" parties would rely on the report for a particular purpose, because a future purchaser of stock belongs to an unlimited class).

The majority cites one non-Washington case wherein a "foreseeable" plaintiff was allowed a cause of action under section 552. *Cubb Group of Ins. Cos. v. C.F. Murphy & Assocs., Inc.*, 656 S.W.2d 766, 774-76 (Mo. Ct. App. 1983). The *Chubb* court found contractors, an architect, and a steel manufacturer liable to plaintiffs injured when a bridge that had been negligently constructed callapsed. The majority's use of *Chubb* is, however, ill suited to the case at bench. Section 552, comment *a* clarely states that the law governing the *Chubb* situation, physical injury, is not analogous to the law governing the situation at bench, monetary loss caused by negligently supplying incorrect information. Moreover, because services are crafted to meet the needs of individual clients, they cannot be likened to a product whose design and manufacture impact equally on all users. *Guy v. Liederbach*, 501 Pa. 47, 58, 459 A.2d 744 (1983). Hence, *Chubb* should not authoritatively direct application of section 552 to the intervenors' complaint.

No intervenor claims to be the beneficiary of a *particular* misrepresentation involving a transaction with a *limited* group of people. All alleged negligent misrepresentations were disseminated to the general public, and no investor received information made uniquely available for his or her benefit. Intervenors' actions for negligent misrepresentation should therefore fail under section 552, and the trial court's CR 12(b)(6) dismissal of this claim should be affirmed. I therefore dissent from the majority's holding.

In sum, I dissent because the majority improperly reverses the trial court's CR 12(b)(6) dismissal of the plaintiffs' and intervenors' WSSA claims, and of the intervenors' negligent misrepresentation claim. I concur in the majority opinion in all other respects.

DOLLIVER and ANDERSEN, JJ., concur with PEARSON, C.J.

APPENDIX B

ORDER DATED FEBRUARY 17, 1988
OF THE WASHINGTON SUPREME COURT

THE SUPREME COURT OF WASHINGTON

FREDRIC HABERMAN, ET AL.,
Appellants,

v.

WASHINGTON PUBLIC POWER SUPPLY SYSTEM, ET AL.,
Respondents.

No. 52559-5

ORDER CHANGING OPINION

It is hereby ordered that the opinion in the above cause, as the same appears at 109 Wn.2d 107, be changed as follows:

1. In the sixth line from the botton of page 116, the words "and accountants" are deleted.

2. In the twenty-first line from the top of page 117, the date "May 17, 1981," is deleted and the date "March 17, 1981," is inserted in its place.

3. In the last line of page 117, the words "all Washington" are deleted and the following words are inserted in their place: "the Washington municipal and public utility district".

Dated this 17th day of February, 1988.

/s/ Vernon R. Pearson
Chief Justice

APPROVED:
/s/ Robert F. Brachtenbach

109 Wn.2d 107

APPENDIX C

ORDER DATED FEBRUARY 19, 1988
OF THE WASHINGTON STATE SUPREME COURT

THE SUPREME COURT OF WASHINGTON

FREDERIC HABERMAN, ET AL, Appellants, v. WASHINGTON PUBLIC POWER SUPPLY SYSTEM, ET AL, Respondents.	No. 52559-5 ORDER GRANTTING MOTION FOR RECONSIDERATION WITHOUT NEW ARGUMENT

The Court having entered an order changing the opinion on February 17, 1988,

It is hereby ordered that further reconsideration is denied.

Dated this 19th day of February, 1988.

/s/ Vernon R. Pearson
Chief Justice

109 Wn.2d 107

173/210

APPENDIX D

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

FREDRICK HABERMAN, M.D., et al. Plaintiffs,	)	
vs.	)	No. 84-2-06452-8
WASHINGTON PUBLIC POWER SUPPLY SYSTEM, et al. Defendants.	)	

COURT'S ORAL DECISION

HEARD BEFORE: The Honorable Terrence A. Carroll
Friday, July 26, 1985

APPEARANCES: Robert H. Jaffe, Christopher Kane, Robert L. Deitz, and Ernest C. Matthews, Attorneys at Law, in behalf of Plaintiffs;

Walter S. Tabler and John Daniels, Attorneys at Law, in behalf of Plaintiff-Intervenors;

James J. Hagan, Attorney at Law, in behalf of Paine Webber, Blyth Eastman, Donald Patterson and Stanley Pardo;

David F. Jurca, Attorney at Law, in behalf of Columbia Defendants

Robert Gordon, Attorney at Law, in behalf of the Snohomish Group

Albert R. Malanca, Ken Kieffer, and Jim Horne, Attorneys at Law, in behalf of Washington Public Utilities Group

John D. Lowery, Hugh R. Tobin, and Thomas W. Burt, Attorneys at Law in behalf of the Small Utilities

APPEARANCES (Continued)

Larry S. Gangnes, and Erick Johnson, Attorneys at Law, in behalf of the Oregon Public Entities

Greg Keller, Michael Schumacher, and Fred Finkelstein, Attorneys at Law, in behalf of Inland Utilities

Jack G. Orr, Attorney at Law, in behalf of Member-Nonparticipants

Steve Rummage, Attorney at Law, in behalf of Ernst & Whinney

Pete Danelo, Attorney at Law, in behalf of Ebasco

Rob Stewart and Dan Murdock, Attorneys at Law, in behalf of Washington Public Power Supply System

Margaret A. Pageler and Hugo E. Oswald, Attorneys at Law, in behalf of Wahkiakum Defendants

Michael Mines, Attorney at Law, in behalf of Chemical Bank

Roy J. Moceri, Attorney at Law, in behalf of R. W. Beck

Stellman K. Keehnel and Ellen Donovan, Attorneys at Law, in behalf of City of Seattle

Elizabeth Blagg, Attorney at Law, in behalf of Wood & Dawson

Robert Abrahams, Chris Youtz, and Steven Sirianni, Attorneys at Law, in behalf of Law Firm Defendants

Friday, July 26, 1985, 4:21 p.m.

THE COURT: I would like to say a couple things preliminarily before getting into the body of my decision. The first is to thank counsel for their efforts—particularly in organizing the

presentation here today. I know there are a lot of issues here that require you to allow other persons to speak on your behalf. I appreciate your willingness to do that to accommodate the Court.

I also want to express that, in reviewing the documents relative to this case, it is apparent that many of these issues can be approached from as many as a dozen different angles. And I think in recognition of and respect for that complexity, the opinions that I am about to give to you are primarily conclusionary.

But I don't want any counsel, who have spent the time that I know you have in preparing the briefs, to think that because I don't specifically mention any argument or proposition or analysis that you gave, that it hasn't been considered. It has. I have done my best to look at every argument and to consider it in the context of the whole case. I only urge that you understand the judicial role, and that is, to sift through it and arrive at a result that I think is premised on the law and based on some element of common sense.

The first thing that we have to address is what, if anything, prevents or bars this action from coming to this Court? It seems to me there are two possible arguments in that regard.

The first is Resolution 890, which was a part of the bonds. And counsel have argued its applicability to the derivative causes of action only, which are Counts 8 through 12 of the Haberman Complaint, and Counts 3 through 7 of the Intervenor's Complaint. The issue, it seems to me, regarding Resolution 890 is whether or not the plaintiffs in this case have followed the necessary steps in order to bring such causes of action. It is my conclusion that they haven't. I think that those claims just mentioned must be dismissed.

The very purpose of Resolution 890 is to place in the hands of a trustee the responsibility for bringing this type of derivative action. By its very definition, a derivative cause of action is to benefit the bond holders—both current and past. That is the trustee's responsibility to pursue. There is no justifiable reason for the plaintiffs here to not follow the procedures outlined in Resolution 890.

The plaintiffs have raised several arguments in opposition to that. One of them is that the particular defendants in this case have no standing to object to the 890 issue. I don't think that's the case. I think that not only has the Supply System responded, but the other defendants as well are always in the position to raise a matter like this. It goes to the very heart of the authority to bring a cause of action. And the 20 percent rule that was not followed here, I think, is fatal to the derivative causes of action.

Secondly, there is an issue argued by Mr. Jurca regarding the res judicata effect of prior litigation, specifically *Chem. Bank 1 and 2*. And as appealing as it may be to rule that the entire cause of action should be barred, I am not going to do that on the basis of res judicata.

The allegations that the plaintiffs raised here are significantly different than those that were raised in *Chem. Bank 1 and 2*. And, although there is an argument that the current claims could have been raised in that particular proceeding, I think they are so substantially different, and represent such a different framework, that the doctrine of res judicata should not be applied. There are also some policy reasons behind the doctrine of res judicata, that counsel just briefly touched on, that have to do with fairness and opportunity to litigate.

Thus, it seems to me that rigid application of res judicata, although arguable, would not apply, except for the equitable and contract causes of action that have been argued by the plaintiff, Haberman in Count 4. It's very clear to me that *Chem. Bank 2* disposes of Count 4, i.e. the doctrine of res judicata would prevent the relitigation of such equitable and contractual claims.

There are also Counts in each of the Complaints relating to Chem. Bank. And given what I heard this morning from counsel for Chem. Bank, I am simply not going to address those Counts in any way. And what I have said, in all respects here today, does not apply to the Counts alleged against Chemical Bank.

Count 2 in the Haberman Complaint is a Federal Securities Count. And as to that particular Count, it is my conclusion that it must be dismissed. The primary basis for Count 2 is the Participants Agreement, which is referenced as a security in the statement attached to the bonds. It is and should be considered a part of the bond. The argument that it's separate is not persuasive. Even if it were construed to be a separate security, my conclusion would still be the same. Because of the exemption under the Federal law, I believe I have no alternative but to dismiss the Federal Securities Claim. The idea of repudiation that the plaintiffs have put forth is simply, I think, without merit.

The statute of limitations arguments I am not going to address, only to say that I think this is a hybrid case in terms of the statute of limitations. The involvement of the Supreme Court in *Chem. Bank 1 and 2* makes it, I think, extremely difficult to establish the starting points that one usually deals with in securities litigation.

Count 3 of the Haberman Complaint, and Count 2 of the Intervenor's Complaint, deal with the State Securities Act. And I think the first issue that should be addressed with reference to that Act is whether or not the governmental immunity provisions of state law would apply.

And I think they would not. Although there's case law in the federal system going the other way, it seems to me that given the history of not only this litigation, but also the language of the law, the legislature deliberately left in the state and political subdivisions with reference to this particular statute. I can't help but make note of the scienter amendment, that I will address later, as further evidence that there was a waiver of the governmental immunity protection in this State.

That being the case, I think we need to then look at the law and determine which if any of the defendants would qualify, for want of a better term. Subsection 1 of 21.20.430 sets out the standard of offeror or seller. And the initial question is whether or not any of the defendants in this case would qualify as an offeror or seller. It is my belief that they don't.

I reject the substantial participation test that plaintiffs argued some Federal Courts have adopted. I think the language of the statute is clear. Offering and selling has a particular meaning in the securities market. To stretch that meaning to include the defendants in this case, I think is beyond the purview of the statute. A detailed, lengthy statute like this, it seems to me, speaks for itself. The Courts should be reluctant to engraft additional civil liabilities where none are apparent.

Subsection 3 presents a more difficult question, and I think is liable to different judicial interpretations. You begin with the first phrase which reads: "Every person who directly or indirectly controls a seller or buyer" may face liability. Now, that allegation is against the municipalities, not against the professional defendants as I understand it.

So we have to at least look at the Complaint to determine whether or not there's any set of circumstances under the allegations that would justify the control, direct or indirect. It is my conclusion that that language would apply to the Supply System and its members, but not to the non-member participants. I say that based on the control discussion in *Chem. Bank 2*, as well as the information that counsel have supplied regarding the organization of the defendant municipalities and other entities.

The only other group then is the professional defendants—for example, the auditor or the accountants (excluding the counsel defendant). The issue is whether or not they would qualify as an employee who materially aids. But I don't think they are employees. I think the plaintiffs perhaps have made out, based on notice and the pleading requirements of this State, a case regarding materially aiding. But these professional defendants, excluding counsel, do not qualify as employees of the seller or buyer so as to come within the ambit of subsection 3, the secondary liability section.

Now, an argument was raised whether or not you can have secondary liability without another defendant having been found liable under Subsection 1. It seems to me that you

possibly could—although that really isn't in front of me at this point to decide. But I don't think that that would be a necessary part of civil liability under the statute, i.e. to have a defendant who is actually found to have violated Subsection 1 before you can have a Subsection 3 violation. I say that because I think a person could not be a party to litigation, or for whatever reason, not be involved in the litigation and you could still have individuals responsible under Subsection 3.

Now, the issue of scienter is also raised with reference to the Washington state claim. It is my conclusion that scienter does apply in this case to whatever defendants are left under Subsection 3, with the exception of counsel. It seems to me that the statute is essentially remedial in nature. It affects only the elements of causes of action that are pled. Being remedial, it can be applied to pending litigation, based upon the case law of this State. I don't think, as counsel for plaintiffs have argued, that it applies to substantive rights of parties. For that reason I believe it would be applicable in the event of a trial in this case.

Now, the Intervenors raise the issue and, although counsel didn't discuss it given the constraints of time, the New York business law. However, you did extensively brief it in your pleadings. It seems to me that the gravamen of this case, from the securities standpoint, is a purported violation of Washington State Law. The latter law applies. New York law does not. For that reason, Count 11 is dismissed. I might add, parenthetically, that in looking at the New York business law, it seems to me that their privity requirements are stricter than in this State. But, again, it's not a basis, necessarily, for my ruling. The New York law is not a part of this case.

Count 8 of the Intervenor's claim is based on the Consumer Protection Act of this State. It is my conclusion that that count must also be dismissed in its entirety. We all know that the statute excludes municipalities from the ambit of the law. The question is whether other governmental entities, in this State or another State would be exempt. I think they would be.

This is, I hope, more of a common sense approach for the reasons in *Chem. Bank 2* that many of the non-member

participants were not responsible under the Participants' Agreement. And it seems to me it would be a frustration of the legal system to rule that the municipalities are exempt, but the other governmental entities, because they call themselves something else, would not be exempt. So that I think a common sense extension of the Consumer Protection Act would be that all of the governmental entities are excluded, including the cooperatives, and the Oregon Public Entities or any other governmental subdivision.

Also, I think particularly with reference to the rural electrical cooperatives, they are so regulated by the government that they would be, pursuant to principles found in the cases, exempt from the application of the law.

The only serious question is whether the non-governmental defendants should be covered by the Consumer Protection Act. Again, for reasons that I indicated earlier, the same analysis would flow on down the line. On a public policy basis it strikes me as incongruous to exempt the governmental entities but hold the professionals responsible, where the transactions and set of circumstances involve and relate to the issuance of public bonds.

There's a second reason. The *Short* case clearly exempts from coverage of the Act those actions that are directly professional in nature. It seems to me that based on everything that is alleged here, the allegations would come within the exemption of the *Short* decision as well. Therefore, as I indicated earlier, the Consumer Protection Count, Number 8, is dismissed.

That leaves the tort allegations 9 and 10 of the Intervenor's Complaint. And whether it matters or not, this was the toughest for me. First, I think that, with reference to the governmental entities outside the State of Washington, Oregon and Idaho law should apply to those particular entities as argued in the briefs. I say that much more out of a feeling of comity between States, than necessarily choice of law. But I think even under choice of law, the heavy weight of public policy would tend toward the application of the particular

state's governmental immunity rules regarding tort liability in this case.

Counsel for plaintiff make arguments about the interest of the State of Washington. I think that's undeniable. But I think more importantly are the interests of the particular States and their own political subdivisions' responsibility. So I think that, at least for Oregon and Idaho, those utilities, for want of a better term, should be governed by their home states' sovereign immunity law, with reference to the tort claims here in Counts 9 and 10.

Under Washington law and for the Washington defendants, the first issue is that of governmental immunity and whether or not the four criteria of *Evangelical* apply. Although it wasn't extensively briefed by counsel, I think that the *Evangelical* steps do apply here. I find that the Washington governmental entities are immune from tort liability, in Counts 9 and 10.

I will just briefly go through those considerations but, fundamentally, one can't help recognizing that the history here is clearly one of a group of public entities making a decision about the course of the Supply System for the energy needs of their consumers. And, as counsel have admitted, it does involve a basic governmental policy and clearly the acts involved are related to that particular objective. It also involves, although in hindsight you might question it, the expertise of the governmental agency. The only one I hesitated on and I asked counsel about, was the fourth requirement that the agency possessed the requisite constitutional and statutory lawful authority. I am persuaded that they do in the context of this case. The bonds were validly issued. We are dealing with a tort claim here. I simply feel that the *Evangelical* doctrine, which is still good law, protects the Washington defendants from liability under Counts 9 and 10.

With reference to the professional defendants, I would have to include them under the same umbrella. For basic policy reasons, it would be unfair and unwise to exclude them from the immunity.

Also, in addition to the immunity, there are other reasons for the dismissal of the negligent misrepresentation claim. They have to do with the principles of duty. There are two theories. One is the public duty that municipalities have. I fail to see how that public duty would extend to providing a cause of action for plaintiffs in the case. With reference to the non-governmental defendants, it seems to me there is no duty under either the Restatement or the *Ultramares* case for extending the duty beyond their individual client or employer, or whatever you want to call them. So that with reference to the claim of negligent misrepresentation, solely on the duty issue, we have another basis for dismissing it.

The fraud issue is one where there's significant emphasis in the briefs on the CR 9b motion. I think, as I at least hinted to counsel, that can be cured by a Motion for More Definite Statement, in the event that point is ever reached.

There are some collateral issues that, not knowing the exact course of this litigation, I will also rule upon.

The relation back of parties, it seems to me, is clearly governed by the civil rules. To allow the plaintiffs, who entered this case subsequent to its original filing, to relate back to the original filing would be in contravention of the rules. Clearly those plaintiffs who enter the case cannot take advantage of the original filing date. This is not a class action. This is not one in which rules governing Civil Rule 23 would be applicable. I am not persuaded by the plaintiffs' efforts to the contrary.

As to the claims, I think it's a different issue. The rule I think is more liberal. And it seems to me that the claims that were subsequently added to the original Complaint would relate back. There's no doubt that they arise out of the same series of events and transactions, and, in general, that is all you need. I think the plaintiffs have done that.

Regarding the additional defendants in the case. Again, not knowing the course of this litigation, let me refer to that. There's an effort to add the parent company of Ebasco and the parent company of United. I think those motions must be denied. Not only are the allegations insufficient in terms of

corporate disregard, but I find no justifiable reason why this amount of time has gone by. There is no excuseable neglect from my point of view. Same thing with the Beck defendants, the individual defendants. The same reasoning applies. I am very concerned about adding individuals to this litigation, where their employers are already defendants.

As to Patterson and Pardo and the August '84 service of process, it seems to me that strict requirements for out-of-state service exist. Substantial compliance for out-of-state service has never been, as far as I know, approved in this State. So that the August '84 service was simply not adequate under the laws of this State.

There has been discussion of a tolling of the statute of limitations with reference to relation back, but I need not address that issue here.

The final thing is that what we have left are the two Counts involving Chemical Bank, which are not before me, and the state security claims. Everything else has been dismissed. The question then is whether or not the state security claim should be stayed pending federal litigation.

I think that the Chemical Bank decision, *Chem. Bank 2*, does make a reference to that particular litigation. But, as both counsel pointed out, we've come quite a distance since that *Chem. Bank 2* case was decided. My only reluctance in not granting a stay would be the fact that we have a state law involved. I do think that the state has a legitimate interest in the enforcement and application of its statute. But, with the exception of that factor, it seems to me that the weight of factors in this case, clearly dictate that a stay is appropriate.

The identity of parties and issues need not be exact. But the similarity here is remarkable. Much of what the plaintiffs want to do can be accomplished within the Federal action, perhaps a more complex proceeding, perhaps more counsel; yet it can be done.

The amount of judicial resources that are involved, as well as legal resources, in tracking two cases with similar claims, is

simply not warranted. I note that the MDL litigation was filed earlier, has brought together many different causes of action, includes the state claim, and includes nearly, if not all, of the same parties. It's my conclusion that the Washington state claim will be stayed pending the federal litigation.

Now, we need another date to present orders. The next hearing on this case will be Tuesday, August 20th, at 3:00 P.M.

All proposed orders, that is orders from either side, and Motions for Reconsideration, must be served and filed by August 9th.

I am asking the plaintiffs, Haberman, to limit their Motions, if they have any, to 50 pages. And the Intervenors to limit their motions, if they have any, to 50 pages of pleading.

Any response must be served and filed by August 16th.

I am going to limit response, if there is any from the defendants, to a total of 100 pages.

I think I have dealt, counsel, with the matters that were presented to the Court today.

Mr. Malanca?

MR. MALANCA: For clarification, I assume you earlier granted my request that the John Does be dismissed; is that right, or did you not?

THE COURT: Yes.

MR. MALANCA: The last point is this, Your Honor, on the stay, I am not quite sure whether your stay is until such time as something may develop in the other case that would add, give rise to a Motion to lift the stay; or is the stay now until the total conclusion of the other case? Because I can see that certain things could happen there, where a lifting of the stay might be appropriate.

THE COURT: I agree, I can't predict that outcome. All I know is that what's left of this case today is the state securities claim. There's an ongoing lawsuit in Federal Court involving that claim. Until the situation changes there, this case is stayed.

THE COURT: Mr. Lowery?

MR. LOWERY: Excuse me, Your Honor, I hesitate to even bring it up, but August 20 is a poor track day in the MDL case with depositions in Portland, San Francisco and New York. The week after that is a week off, if there was any way, if it wasn't too inconvenient for the Court.

THE COURT: That's the judicial conference.

MR. KANE: Your Honor, I would suggest that perhaps we could put it off until, say, the first week in September. We've got to read it over and decide where we are going to go from here. I know that some counsel also would like to take a few days in August. I would just throw that out.

THE COURT: Okay, well, we'll go one week past that, then.

MR. LOWERY: Your Honor?

THE COURT: Yes.

MR. LOWERY: While we are all looking at calendars, we do have an off day on the 16th and 17th of September. Let me take that back, Your Honor, the Fridays in the MDL case are half days. If there was any way to do it on a Friday, then any Friday would be up for grabs in the afternoon. We go to lunch on Fridays and then the rest of the day is a free day, a free half day.

THE COURT: Okay, any input from the plaintiffs on the day?

MR. KANE: Your Honor, I would suggest September 9th.

THE COURT: That's a Monday.

MR. KANE: September 6th.

THE COURT: September 6, Okay. I am going to have some plans then that I am not sure about, and I hate to,—Is there too much suspicion surrounding Friday the 13th?

MR. ABRAHAMS: No, Your Honor,

MR. JURCA: Your Honor, would it be possible, to take about a one minute recess to confer about these dates?

THE COURT: Sure. Go ahead, do that now.

(Discussion held off the record.)

THE COURT: Okay, let's see what we can do on this date.

MR. JURCA: Your Honor, I think the defendants have reconsidered, and I think that if the 20th is the only time that's available for the Court that week, that would be fine. The 23rd of that week, Friday of that week of August would be most convenient for us. But I think we'd be willing to live with the 20th if that was the only time the Court was available.

THE COURT: What's the plaintiffs' reaction to the 23rd?

MR. TABLER: We would, we feel that the 23rd is too early.

THE COURT: Okay.

MR. TABLER: We would rather have it in as early in September as we can, or whatever accommodates the Court's schedule.

MR. KANE: We have no problem with the 13th.

THE COURT: Let's go with September 13th, counsel. We will move it up to 1:30 on that day.

We've got to change these other dates. For the proposed Orders and any Motions for Reconsideration, those should then be filed, served and filed by September—

MR. JURCA: Your Honor, may I offer one thought on behalf of the defendants?

THE COURT: Sure.

MR. JURCA: It's a whale of a job to get us coordinated to all live within 100 pages. And we really need any extra time that we can to respond, for that reason it is really necessary.

THE COURT: Let's try for, then, the 30th, plaintiffs or defendants, any Motions for Reconsideration served and filed by the 30th; again, keeping in mind the page limit. And then

the response should come back, it would seem to me, by the 9th of September, served and filed.

MR. JURCA: I will take whatever, we'll live with whatever we can, Your Honor, under the circumstances. But the plaintiffs, who presumably will be asking for reconsideration, will have a lot more time than one week, plus a weekend. And it's the coordination among the defendants that is particularly time consuming.

MR. TABLER: Your Honor, I think it's pretty clear from your ruling that we have the burden of the work to be done from between now and the time of the hearing.

THE COURT: September 10th will give you another day. With your response, again keep it within that 100 pages. I am not going to let you go beyond that.

Thank you, counsel.

MR. KANE: There's one more matter, for the record, we made, I sent in a letter asking to join 35 plaintiffs. I wouldn't think there would be any objection to that. I would like to get that housekeeping matter taken care of, with the Court's permission, to add those 35 plaintiffs.

THE COURT: Sure. Go ahead.

MR. JAFFE: Your Honor, one clarification, that 50 pages is per plaintiff and plaintiff Intervenors, in other words?

THE COURT: Yes, a full 100.

MR. JAFFE: A full 100 between us, all right, I just wanted to make sure.

(The hearing in the above-entitled matter was concluded at 5:15 p.m.)

APPENDIX E

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

FREDRIC HABERMAN, M.D., et al.,
Plaintiffs,

and

AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC., et al.,
Plaintiffs-Intervenors,

and

UNITED STATES TRUST COMPANY OF NEW YORK, AS TRUSTEE,
Plaintiff-Intervenor,

v.

WASHINGTON PUBLIC POWER SUPPLY SYSTEM, et al.,
Defendants.

No. 84-2-06452-8

ORDER AND JUDGMENT OF DISMISSAL

This matter was preassigned to the undersigned judge of this Court. At hearings on April 12, 1985 and May 9, 1985 plaintiffs were given leave to file a Third Amended Complaint and plaintiffs-intervenors were given leave to file a First Amended Complaint In Intervention. Defendants, other than Chemical Bank, filed motions to dismiss, on various grounds, the claims asserted against them by plaintiffs and plaintiffs-intervenors. Affidavits and memoranda were filed in support of defendants' motions to dismiss, and affidavits and memoranda were submitted in opposition thereto by plaintiffs and plaintiffs-intervenors. Oral argument on the motions to dismiss was heard on July 26, 1985. The Court announced its oral decision following the conclusion of oral argument on that date.

Plaintiffs and plaintiffs-intervenors thereafter filed motions for reconsideration of the Court's decision. In addition, the

Supply System and the Supply System members and defendants Houghton, Cluck, Coughlin & Riley and Wood & Dawson filed motions for reconsideration of the Court's decision. Oral argument on the motions for reconsideration was heard on October 7, 1985, following which the Court denied the motions for reconsideration of plaintiffs and plaintiffs-intervenors, but granted the motions for reconsideration of the aforesaid defendants (except that Wood & Dawson's motion for reconsideration was denied with respect to the alleged unconstitutionality of certain aspects of RCW 21.20.430(7)).

All parties and their counsel were given an opportunity to present their arguments at the July 26, 1985 and October 7, 1985 hearings, and the Court has heard and duly considered all arguments presented at the hearings and has read and duly considered the pleadings, papers and materials filed in this action as listed in the Appendix attached hereto and incorporated herein by this reference.

Accordingly, it is hereby

ORDERED, ADJUDGED and DECREED as follows:

1. All claims set forth in plaintiffs' Third Amended Complaint and all claims set forth in the plaintiffs-intervenors' First Amended Complaint In Intervention are hereby dismissed, with prejudice;

2. The so-called "scienter" amendment to the Washington State Securities Act (Laws of 1985, ch. 171, now codified as RCW 21.20.430(7)) is valid and applies retroactively to this litigation;

3. The claims of parties joined as plaintiffs after the filing of the original complaint do not relate back to the date of filing of the original complaint;

4. Claims added after the filing of the original complaint, but asserted by plaintiffs named in the original complaint and arising out of the same series of events and transactions as alleged in the original complaint, do relate back to the date of filing of the original complaint;

5. Plaintiffs' failure to join earlier their proposed additional defendants Edward J. Wittman, Herbert C. Westfall, Robert B. Gallup, Raytheon Company and ENSERCH Corporation constituted inexcusable neglect, and in any event plaintiffs' Third Amended Complaint does not state a cause of action against them. Accordingly, plaintiffs' motion to join the proposed additional defendants is denied;

6. As an additional ground for dismissal of plaintiffs' Third Amended Complaint with respect to the individual defendants Donald C. Patterson and Stanley T. Pardo, the motion of said defendants to dismiss the summons and complaint of the Haberman plaintiffs on the grounds of defective service of process is granted in all respects; and

7. All defendants are to be awarded their taxable costs against plaintiffs and plaintiffs-intervenors.

DONE IN OPEN COURT this 7th day of October, 1985.

/s/ TERRENCE A. CARROLL

Terrence A. Carroll
Judge of the Superior Court

ORDER AND JUDGEMENT OF DISMISSAL

APPENDIX F

Acknowledged Service This
10th day of May 1988
KENNETH O. EIKENBERRY
Attorney General

By /s/ Lloyd W. Peterson
Deputy Attorney General

No. 52559-5

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

FREDRIC HABERMAN, M.D., et al.,[1]
Appellants,

and

AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC.; AMERICAN EXPRESS INTERNATIONAL BANKING CORPORATION; FIREMAN'S FUND INSURANCE COMPANY; THE AMERICAN INSURANCE COMPANY; AND ASSOCIATED INDEMNITY CORPORATION,
Intervenors-Appellants,

and

UNITED STATES TRUST COMPANY OF NEW YORK, as Trustee,
Intervenor-Appellants,

v.

WASHINGTON PUBLIC POWER SUPPLY SYSTEM; PUBLIC UTILITY DISTRICT NO. 1 OF BENTON COUNTY, WASHINGTON; PUBLIC UTILITY DISTRICT NO. 1 OF CHELAN COUNTY, WASHINGTON; PUBLIC UTILITY DISTRICT NO. 1 OF CLALLAM COUNTY, WASHINGTON; PUBLIC UTILITY DISTRICT NO. 1 OF CLARK COUNTY, WASHINGTON; PUBLIC UTILITY DISTRICT

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[1] The Haberman Appellants are listed on Attachment A.

INTERVENORS' NOTICE OF APPEAL TO
U.S. SUPREME COURT

No. 1 of Cowlitz County, Washington; Public Utility District No. 1 of Douglas County, Washington; City of Ellensburg, Washington; Public Utility District No. 1 of Franklin County, Washington; Public Utility District No. 1 of Grant County, Washington; Public Utility District No. 1 of Grays Harbor County, Washington; Public Utility District No. 1 of Klickitat County, Washington; Public Utility District No. 1 of Lewis County, Washington; Public Utility District No. 1 of Mason County, Washington; Public Utility District No. 1 of Okanogan County, Washington; Public Utility District No. 1 of Pacific County, Washington; City of Richland, Washington; Public Utility District No. 1 of Skamania County, Washington; Public Utility District No. 1 of Snohomish County, Washington; City of Tacoma, Washington; Public Utility District No. 1 of Wahkiakum County, Washington; City of Seattle, Washington; Public Utility District No. 1 of Ferry County, Washington; Public Utility District No. 1 of Kittitas County, Washington; Central Lincoln People's Utility District, Oregon; Clatskanie People's Utility District, Oregon; Public Utility District No. 3 of Mason County, Washington; Northern Wasco County People's Utility District, Oregon; Public Utility District No. 1 of Pend Oreille County, Washington; Tillamook People's Utility District, Oregon; Vera Irrigation District No. 15, Washington; City of Bandon, Oregon; City of Blaine, Washington; City of Bonners Ferry, Idaho; City of Burley, Idaho; City of Canby, Oregon; City of Cascade Locks, Oregon; City of Centrailia, Washington; City of Drain, Oregon; City of Heyburn, Idaho; City of Idaho Falls, Idaho; Town of McCleary, Washington; City of McMinnville, Oregon; City of Milton-Freewater, Oregon; City of Port Angeles, Washington; City of Rupert, Idaho; City of Springfield, Oregon; Town of Steilacoom, Washington; City of Sumas, Washington; Adler Mutual Light Com-

PANY, WASHINGTON; BENTON RURAL ELECTRIC ASSOCIATION, WASHINGTON; BIG BEND ELECTRIC COOPERATIVE, INC., WASHINGTON; BLACHLY-LANE ELECTRIC COOPERATIVE ASSOCIATION, OREGON; CENTRAL ELECTRIC COOPERATIVE, INC., OREGON; CLEARWATER POWER COMPANY, IDAHO; COLUMBIA BASIN ELECTRIC COOPERATIVE, INC., OREGON; COLUMBIA RURAL ELECTRIC ASSOCIATION, INC., OREGON; CONSUMERS POWER, INC., OREGON; COOS-CURRY ELECTRIC COOPERATIVE, INC., OREGON; DOUGLAS ELECTRIC COOPERATIVE, INC., OREGON; ELMHURST MUTUAL POWER & LIGHT COMPANY, WASHINGTON; FALL RIVER RURAL ELECTRIC COOPERATIVE, INC., IDAHO; GLACIER ELECTRIC COOPERATIVE, MONTANA; HOOD RIVER ELECTRIC COOPERATIVE, OREGON; IDAHO COUNTY LIGHT & POWER COOPERATIVE ASSOCIATION, INC., IDAHO; INLAND POWER & LIGHT COMPANY, WASHINGTON; KOOTENAI ELECTRIC COOPERATIVE, INC., IDAHO; LANE ELECTRIC COOPERATIVE, INC., OREGON; LINCOLN ELECTRIC COOPERATIVE, INC., WASHINGTON; LOST RIVER ELECTRIC COOPERATIVE, INC., IDAHO; LOWER VALLEY POWER & LIGHT, INC., WYOMING; MIDSTATE ELECTRIC COOPERATIVE, INC., OREGON; MISSOULA ELECTRIC COOPERATIVE, INC., MONTANA; NESPELEM VALLEY ELECTRIC COOPERATIVE, INC., WASHINGTON; NORTHERN LIGHTS, INC., MONTANA; OHOP MUTUAL LIGHT COMPANY, WASHINGTON; OKANOGAN COUNTY ELECTRIC COOPERATIVE, INC., WASHINGTON; ORCAS POWER & LIGHT COMPANY, WASHINGTON; PARKLAND LIGHT & WATER COMPANY, WASHINGTON; PRAIRIE POWER COOPERATIVE, INC., IDAHO; RAFT RIVER RURAL COOPERATIVE, INC., IDAHO; RAVALLI COUNTY ELECTRIC COOPERATIVE, INC., MONTANA; RURAL ELECTRIC COMPANY, IDAHO; SALEM ELECTRIC, OREGON; SALMON RIVER ELECTRIC COOPERATIVE, INC., IDAHO; TANNER ELECTRIC, WASHINGTON; UMATILLA ELECTRIC COOPERATIVE ASSOCIATION, OREGON; UNITY LIGHT & POWER COMPANY, WASHINGTON; VIGILANTE ELECTRIC COOPERATIVE, INC., MONTANA; WASCO ELECTRIC COOPERATIVE, INC., WASHINGTON; WELLS RURAL ELECTRIC COMPANY, NEVADA; WEST OREGON ELECTRIC COOPERATIVE, INC., OREGON; ERNST

& WHINNEY, CPA'S; BLYTH, EASTMAN, PAINE, WEBBER, INC.; DONALD C. PATTERSON, III; STANLEY T. PARDO; PAINE, WEBBER, INC.; PAINE, WEBBER, JACKSON & CURTIS, INC.; R.W. BECK & ASSOCIATES; UNITED ENGINEERS & CONSTRUCTORS, INC.; EBASCO SERVICES, INC.; WOOD & DAWSON; HOUGHTON, CLUCK, COUGHLIN & RILEY; JOHN DOE AND RICHARD ROE, INC.,

Appellees,

and

CHEMICAL BANK,
Appellee in its capacity as Bond Trustee.

INTERVENORS' NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Appellants American Express Travel Services Company, Inc.; American Express International Banking Corporation; Fireman's Fund Insurance Company; The American Insurance Company; Associated Indemnity Corporation (collectively "American Express Companies"); and United States Trust Company of New York, as Trustee, are appealing to the United States Supreme Court from the portion of the decision and order issued in this action on October 8, 1987, as corrected by the order dated February 17, 1987, which held that Wash. Rev. Code Section 21.20.430(7) (1986 Wash. Laws Ch. 304) does not violate the United States Constitution.

INTERVENORS' NOTICE OF APPEAL TO
U.S. SUPREME COURT

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

DATED May 10th, 1988.

Respectfully submitted,

/s/ WALTER S. TABLER

Walter S. Tabler
Mark I. Crohn
Smith, Smart, Hancock,
Tabler & Middlebrooks
3800 Columbia Center
701 Fifth Avenue
Seattle, Washington 98104
(206) 624-7272

Attorneys for American Express
Companies, and United States
Trust Company of New York

Of Counsel to
Americal Express Companies:

Stephen A. Weiner
David G. Keyko
Susan J. Kohlmann
Winthrop, Stimson,
Putnam & Roberts
40 Wall Street
New York, NY 10005

INTERVENORS' NOTICE OF APPEAL TO
U.S. SUPREME COURT

ATTACHMENT A

The Haberman Appellants include:

Fredric Haberman, M.D.; Claude Purvis; Nerou Cheng; Ted R. Pape; Aubrey L. Moss; John H. Biggs; Nicholas C. Dascoli; Arnold Goldberg; Frederick J. Gormley; Irving J. Gross; Rose Gross; Edward Kawash; Frank T. Kiel; Martin I. Schwartz; Kenneth C. Washburne; Jack B. Weinberger; Alice W. Wise; Lloyd W. Wise; Norma Sandison; Daniel Gelfond; Jeanne Christopher; John S. Christopher; Grace Freeman Rosen; Leo Freeman; George M. Hrunka; Charles M. Judge; The Morris County Savings Bank; Peter Madan; Peggy Ann Madan; Robert W. Madan; William A. Keyser; Marguerite E. Keyser; Marguerite E. Keyser, POA for Francis J. Herron; Merton S. Freeman; James Korsten, M.D.; Albert Baker; Barbara Jentis; Leigh E. Dunn; Rachel S. Dunn; Howard L. Ray; Daniel A. Berkoff; Albert B. Berkoff; George C. Ganzberg; Gabriel A. Calenda; Charles Zeidner; Corrine S. Corwin; Lucille Zager; Fay Freeman; Intramerica Life Insurance Company; Colonial Penn Life Insurance Company; Philadelphia Savings Fund Society; Regent Insurance Company; Reliance Insurance Company; Planet Insurance Company; Commonwealth Land Title Insurance Company; Criterion Insurance Company; Government Employees Insurance Company; The Broad Street National Bank of Trenton; Ronald Klinger; Robert Luban; Harleysville Mutual Insurance Company; Pennbank/Erie, formerly Security Peoples Trust Company; General Accident Insurance Company; Pennsylvania General Insurance Company; Camden Fire Insurance Association; Potomac Insurance Company of Illinois; Farmers State Savings Bank; Carson L. Shade; Mercantile National Bank of Indiana; David Fiske, M.D.; Albert W. Thompson, M.D.; Jack Schaefer; Robert L. Mast; Loretta Steinbach; Robert N. Wright; Jacob Malit; Doris Malit; Al Groschen; Marvin Neben; Shirley Neben; William C. Starrett, II; Arthur Brown; Arthur Brown, Trustee for 1979 Ethel Glazer Trust; Saul M. Ferman; Jack A. Schaps; Leon

Fein; Lawrence W. Pendelton; Imon R. Gammage; Lucy E. Gammage; Dave Rosenthal; Bernie Rosenthal; NCNB Bancorporation, Inc.; Philadelphia National Bank; Albert M. Grathwol and John D. Grathwol, Trustees of the Mr. & Mrs. Albert M. Grathwol Trust of 1981; Kira Fomenko; Abraham G. Luboff; Deborah R. Luboff; William D. Cane; Wemple State Bank; Brown County State Bank; Charles F. Deater; Albert Caponetto; Harold B. Hogle; G. Ralph Bartolme, Esq.; B.M. Behrends Bank; George Tomisini; Albert R. Cox; Norman L. Kaufman and Lillian Kaufman; Herbert L. Press; Coronado Bank; Cielo Vista Bank; Suburban Trust & Savings Bank; Farm Bureau Mutual Insurance Company of Michigan; J. Corlas Cole; Herbert Eckerling; Perrin H. Eckerling; Morrison Rutherford, M.D.; Central National Insurance Company of Omaha; William Randall Dawson; American Family Life Assurance Company of Columbus; Rockwood Insurance Company; SouthTrust Bank of Alabama, N.A., SouthTrust Bank of Marion County; SouthTrust Bank of Selma; SouthTrust Bank of Sand Mountain; SouthTrust Bank of Dothan; SouthTrust Bank of Baldwin County; SouthTrust Bank of Calhoun County; SouthTrust Bank of Etowah County; South Trust Bank of Huntsville; SouthTrust Bank of Mobile; Bank of Heflin; Mutual Service Casualty Insurance Company; Pennsylvania National Mutual Casualty Insurance Company; 1st Source Bank; Provident Alliance Life Insurance Company; Balboa Insurance Company; Henry L. Pohndorf; Modern Service Insurance Company; Dr. Wally Teuscher; Frank D. DeVol; Samual Lavine Trust; Rose Lavine Trust; Prudential Reinsurance Company; Prudential Property & Casualty Insurance Company; Progressive Casualty Insurance Company; North Carolina Farm Mutual Insurance Company; J. Bruce Forbes; Milton & Charlotte Forbes; Joel M. Davis; Ron Nelson; Charles M. Schulz; Edward P. Swain, Jr.; W.I. Osborne; Johanna Budman; Christine A. Simon; Peter Van Halen; Glenn R. Lawrence; Ernest E. Elmore; June T. Shepherd; Vincent De Sciose; Empire Fire & Marine Insurance Company; American States Insurance Company; American

Economy Insurance Company; The Lincoln National Life Insurance Company; Insurance Company of Illinois; Chicago Title Insurance Company; Peter M. Jordan; Neale Onstot; Ester Kaplan; Phyllis B. Zasloff; Patsy Riccardello; Myron Erdmann; Edythe Erdmann; Leo S. Guthman; Charles W. Mullenix; Margaret R. Just; Marshall S. Salkin, M.D.; Paul Doll, Trustee for Audrey B. Love; Wausau Insurance Companies; Employers Insurance of Wausau; Wausau Underwriters Insurance; Robert M. Carlton, M.D., The Hanover Insurance Co.; Citizens Insurance Co. of America; SteinRoe Tax Exempt Bond Fund; Bernadice A. Rischoff; Shirley M. Elliott; Robert N. Mayer; Dr. Raymond M. Chaitin; Sydney Vender; First Fidelity Bank; Robert Kunst; Milton Greenfield, Jr.; Catherine C. Swartchild as Trustee for James Swartchild UAD 10/25/62; Rose Kunst; Jack J. Irving; Florence Irving; David Bachner; Rita Bachner; George L. Kroll as Trustee for George L. Kroll Trust UAD 12/05/72; Michael Cudahy; Elizabeth Stein as Trustee of Living Trust; Jeanette S. Elliott as Trustee for Jeannette S. Elliott Trust; Helen F. Culver; Philip J. James; Edward S. Tishman, Trustee U/A 12/18/72, f/b/o Andrew P. Tishman; Edward S. Tishman U/A 01/20/82, f/b/o Andrew P. Tishman; Edward S. Tishman U/A 02/28/79, f/b/o Leslie Tishman; Lelan H. Menke; June R. Menke; Beatrice T. Kester; Michael Mullins; Maryea Mullins; Frank Williams; Bea Tanne Morris; James M. Maul; Berverly W. Maul; Max W. Strauss; John Farnam; Robert G. Farnam; Franklin W. Farnam; Edward Jacks; Johathan S. Powell; John Verry; Jack Jay; A. Linc Lancet; Peoples National Bank of Washington, Executor for the Estate of John H. Sellen, deceased; W.J. Thomas Ferguson, Executor for the Estates of Mary Violet and William H. Ferguson, deceased; William B. Moroe; John R. Janet; Louise Shapiro; Robert J. Anderson; Barr et M. Daniels; Blanche Daniels; Merlin C. Perkins; Anthony Riccardello; William Hauptman; Dr. Alfred J. Cinelli; Union Safe Deposit Bank; Union Bank & Trust Company, N.A.; Gayle M. Schubach, trustee for Judy Radcliffe; Gayle M. Schubach, trustee for Henry Schubach; Gertrude Schwartz; Barnett Banks Trust

Company, N.A., in various fiduciary and/or agency capacities; W.T. Cummins; Midlantic National Bank; Midlantic National Bank/North; Joe Aggio; Rosalia Aggio; Florence Elliott; Florence Savin, Trustee for Madeline Hecht; Karl B. Kluge; Geraldine V. Kluge; Edward D. Meigs Trust, UDT dated 7/08/82; United Jersey Banks; Audobon Indemnity Company; United Guaranty Corporation; Garth Living Trust; Saul Haimowitz; Ruth Haimowitz; Westmount Properties; Saul Haimowitz, Inc., Employees Retirement Trust Fund; Textile Financial Corp.; Robert F. McMulty; Fred R. Jueneman or Rodney W. Jueneman, co-trustees UAD 9/14/77; Yale M. Leavy; Edwin L. Garthwaite; Arthur Hargrave; Eugene E Koubeck; Richard L. Bakman; Lois Gregory; James P. Devere; Richard F. Hamilton; Jean Needham; William P. Allen; Helene P. Allen; Edward C. Forsyth; Ed Daniels; Richard Fuchslin; Helen Taylor; Worldwide Underwriters Insurance Company; E. Nicholas Sargent, M.D.

INTERVENORS' NOTICE OF APPEAL TO
U.S. SUPREME COURT

No. 52559-5

IN THE SUPREME COURT OF
THE STATE OF WASHINGTON

FREDRIC HABERMAN, M.D., *et al.*,
Appellants,

and

AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC.; AMERICAN EXPRESS INTERNATIONAL BANKING CORPORATION; FIREMAN'S FUND INSURANCE COMPANY; THE AMERICAN INSURANCE COMPANY; AND ASSOCIATED INDEMNITY CORPORATION,
Intervenors-Appellants,

and

UNITED STATES TRUST COMPANY OF NEW YORK, as Trustee,
Intervenor-Appellants,

v.

WASHINGTON PUBLIC POWER SUPPLY SYSTEM *et al.*,

AFFIDAVIT OF SERVICE OF INTERVENORS' NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Walter S. Tabler, being first duly sworn on oath, deposes and says:

1. I am one of the attorneys for American Express Travel Services Company, Inc., American Express International Banking Corporation, Fireman's Fund Insurance Company, The American Insurance Company, Associated Indemnity Corporation, and United States Trust Company of New York.

2. Pursuant to Paragraphs 3 and 4 of this Affidavit, all parties required to be served have been served.

3. On May 10th, 1988, I mailed a copy of the Intervenors' Notice of Appeal to the U.S. Supreme Court to the attorneys of record herein listed on Exhibit "B" attached hereto and made a part hereof by this reference.

4. On May 10, 1988, I caused a copy of Intervenors' Notice of Appeal to the U.S. Supreme Court to be hand delivered to the office of Kenneth O. Eikenberry, Attorney General for the State of Washington, Highways-Licenses Bldg., Olympia, WA 98504.

/s/ WALTER S. TABLER
Walter S. Tabler

SUBSCRIBED AND SWORN TO before me this 10th day of May, 1988.

/s/ JOYCE SCHWENSEN

NOTARY PUBLIC in and for the State of Washington, residing in Seattle. My commission expires: 9-20-89.

AFFIDAVIT OF SERVICE OF NOTICE
OF APPEAL TO U.S. SUPREME COURT

EXHIBIT B

Ferguson & Burdell
Mr. Christopher Kane
Mr. Scott R. Tucker
29th Floor, One Union Square
Seattle, Washington 98101

Jaffe & Schlesinger, P.A.
Mr. Robert H. Jaffe
Mr. Howard Schlesinger
8 Mountain Avenue
Springfield, New Jersey
07081-1788

Ginsburg, Feldman & Bress
Mr. Myer Feldman
Mr. Robert Deitz
Mr. Edward Tolchin
1250 Connecticut Ave. N.W.
Suite 800
Washington, D.C. 20036

Thoreson, Yost, Berry &
Matthews
Mr. Ernest C. Matthews
825 Peoples Nat'l Bank Bldg.
Seattle, Washington 98171

Riddell, Williams, Bullitt
& Walkinshaw
Mr. John D. Lowery
44th Floor, Seattle-First Nat'l
Bank Building
Seattle, Washington 98154

Syrdal, Danelo, Klein & Myre
Mr. Peter Danelo
Mr. Otto Klein, III
Suite 2400--4th & Blanchard
Bldg.
Seattle, Washington 98121

Gordon, Thomas, Honeywell,
Malanca, Peterson & Daheim
Mr. Albert R. Malanca
Mr. Kenneth Keiffer
Mr. Donald Cohen
P.O. Box 1157
Tacoma, Washington 98401

Lane, Powell, Moss & Miller
Mr. Larry S. Gangnes
Mr. John R. Tomlinson
3800 Rainier Bank Tower
Seattle, Washington 98101

Halstead, Meyer & Knox
Mr. Dwight A. Halstead
P.O. Box 708
Prosser, Washington 99350

Williams, Lanza, Kastner
& Gibbs
Mr. Thomas D. Theirsen
P.O. Box 21926
Seattle, Washington 98111

Pillsbury, Madison & Sutro
Mr. Dennis R. Bromley
Attorney at Law
P.O. Box 7880
San Francisco, California 94120

Smith & Rosellini
Mr. Jacob L. Smith
P.O. Box 632
Lynden, Washington 98264

Bennett & Bigelow
Mr. David A. Bennett
Ms. Elizabeth Blagg
Suite 1580—1111 Third Ave. Bldg.
Seattle, Washington 98101

Gelman, Couture & Pate
Mr. Herbert Gelman
1101 Fawcett—Suite 300
Tacoma, Washington 98402

O'Connor, Ludwigson, Thompson & Hayes
Mr. Edward B. O'Connor
P.O. Box 399
Bellingham, Washington 98227

Harris, Mericle, Orr & Bariault
Mr. Malcom S. Harris
Mr. Jack G. Orr
Suite 3210—First Interstate Ctr.
Seattle, Washington 98104

Ernst & Whinney
Mr. Emmett Eagan
2000 National City Center
Cleveland, Ohio 44114

Bogle & Gates
Mr. Ronald E. McKinstry
Bank of California Building
Seattle, Washington 98164

Foster, Pepper & Shefelman
Mr. Camden M. Hall
Mr. Stellman Keehnel
Mr. Daniel Thieme
Suite 3400, 1111 Third Ave. Bldg.
Seattle, Washington 98101

The Williams, Novack & Hansen Law Firm
Mr. Edward D. Hansen
P.O. Box 1077
Everett, Washington 98206

Rankin, McMurry, Vavrosky & Doherty
Mr. Peter R. Mersereau
1600 Benjamin Franklin Plaza
Portland, Oregon 97258

Johnson, Marceau, Karnopp & Peterson
Mr. R.L. Marceau
825 N.W. Bond Street
Bend, Oregon 97701-2799

Schwabe, Williamson, Wyatt, Moore & Roberts
Mr. Bernard M. Ryan
Mr. Rockne Gill
Mr. J. Laurence Cable
1211 S.W. Fifth Avenue
Suite 1600-1800 Pacwest Center
Portland, Oregon 97204-1082

Karr, Tuttle, Koch, Campbell,
Mawer & Morrow
Mr. John F. Kruger
1111 Third Avenue—Suite 2500
Seattle, Washington 98101

Schader, Harrison, Segal
& Lewis
Mr. Ralph Wellington
1600 Market Street, Suite 3600
Philadelphia, Pennsylvania 19103

Bullivant, Houser, Bailey,
Hanna, Pendergrass, Hoffman,
O'Connell & Goyak
Mr. R. Erick Johnson
Mr. Ronald E. Bailey
1400 Pacwest Center
Portland, Oregon 97204—3797

Donovan, Leisure, Newton
& Irvine
Mr. Daniel R. Murdock
30 Rockefeller Plaza
New York, New York 10112

Nelle & Packer
Mr. Richard A. Nelle
P.O. Box 1570
Blaine, Washington 98230

Hillis, Clark, Martin & Peterson
Mr. Michael F. Schumacher
Mr. Gregory E. Keller
500 Galland Building
1221 Second Avenue
Seattle, Washington 98101-1745

Mr. James P. McNally
Attorney at Law
P.O. Box 258
Ione, Washington 99139

Mr. Ronald J. English
Wash. Public Power Supply
System Office of Counsel
P.O. Box 968
Richland, Washington 99352

Platt, Irwin, Colley,
Oliver, Miller & Wood
Mr. Craig L. Miller
Mr. Bart Irwin
403 South Peabody
Port Angeles, Washington 98362

Betts, Patterson & Mines
Mr. Michael Mines
800 Financial Center
1215 Fourth Avenue
Seattle, Washington 98161

Reed, McClure, Moceri,
Thonn & Moriarty
Mr. Roy Moceri
3600 Columbia Center
701 Fifth Avenue
Seattle, Washington 98104-7007

Davis, Wright & Jones
Mr. Stephen M. Rummage
2600 Century Square
1501 Fourth Avenue
Seattle, Washington 98154

Culp, Dwyer, Guterson & Grader
Mr. Robert D. Stewart
2700 One Union Square
Seattle, Washington 98101

Schulte, Roth & Zabel
Mr. Irwin J. Sugarman
Mr. Roger Mead
900 Third Avenue
New York, New York 10022

Simpson, Thacher & Bartlett
Mr. James J. Hagan
Mr. Robert Woody
One Battery Park Plaza
New York, New York 10004

Sirianni & Youtz
Mr. Christopher Youtz
16th Floor—1111 Third Ave.
Seattle, Washington 98101

Mr. Ralph K. Nickerson
Attorney at Law
110 West Allyn Street
Goldendale, Washington 98620

Wheeler & Huss
Mr. Edwin Wheeler
P.O. Box 11287
Tacoma, Washington 98411

Helsell, Fetterman, Martin,
Todd & Hokanson
Mr. David F. Jurca
Ms. Linda J. Cochran
P.O. Box 21846
Seattle, Washington 98111

Levy, Schultz & Sweeney
Mr. James Levy
P.O. Box 891
Pasco, Washington 99301

Acknowledged Service This
10th day of May 1988

KENNETH O. EIKENBERRY
Attorney General

By /s/ LLOYD W. PETERSON
Deputy Attorney General

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

FREDRIC HABERMAN, M.D., *et al.*,[1] Appellants, and AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC.; AMERICAN EXPRESS INTERNATIONAL BANKING CORPORATION; FIREMAN'S FUND INSURANCE COMPANY; THE AMERICAN INSURANCE COMPANY; AND ASSOCIATED INDEMNITY CORPORATION, Intervenors-Appellants, and UNITED STATES TRUST COMPANY OF NEW YORK, AS TRUSTEE, Intervenor-Appellants, *v.* WASHINGTON PUBLIC POWER SUPPLY SYSTEM; PUBLIC UTILITY DISTRICT NO. 1 OF BENTON COUNTY, WASHINGTON; PUBLIC UTILITY DISTRICT NO. 1 OF CHELAN COUNTY, WASHINGTON; PUBLIC UTILITY DISTRICT NO. 1 OF CLALLAM COUNTY, WASHINGTON; PUBLIC UTILITY DISTRICT NO. 1 OF CLARK COUNTY, WASHINGTON; PUBLIC UTILITY DISTRICT NO.1 OF COWLITZ COUNTY, WASHINGTON; PUBLIC UTILITY DISTRICT NO. 1 OF DOUGLAS COUNTY, WASHINGTON; CITY OF ELLENS-	No. 84-2-06452-8 INTERVENORS' NOTICE OF APPEAL TO THE U.S. SUPREME COURT

[1] The Haberman Appellants are listed on Attachment A.

BURG, WASHINGTON; PUBLIC UTILITY DISTRICT NO. 1 OF FRANKLIN COUNTY, WASHINGTON; PUBLIC UTILITY DISTRICT NO. 1 OF GRANT COUNTY, WASHINGTON; PUBLIC UTILITY DISTRICT NO. 1 OF GRAYS HARBOR COUNTY, WASHINGTON; PUBLIC UTILITY DISTRICT NO. 1 OF KLICKITAT COUNTY, WASHINGTON; PUBLIC UTILITY DISTRICT NO. 1 OF LEWIS COUNTY, WASHINGTON; PUBLIC UTILITY DISTRICT NO. 1 OF MASON COUNTY, WASHINGTON; PUBLIC UTILITY DISTRICT NO. 1 OF OKANOGAN COUNTY, WASHINGTON; PUBLIC UTILITY DISTRICT NO. 1 OF PACIFIC COUNTY, WASHINGTON; CITY OF RICHLAND, WASHINGTON; PUBLIC UTILITY DISTRICT NO. 1 OF SKAMANIA COUNTY, WASHINGTON; PUBLIC UTILITY DISTRICT NO. 1 OF SNOHOMISH COUNTY, WASHINGTON; CITY OF TACOMA, WASHINGTON; PUBLIC UTILITY DISTRICT NO. 1 OF WAHKIAKUM COUNTY, WASHINGTON; CITY OF SEATTLE, WASHINGTON; PUBLIC UTILITY DISTRICT NO. 1 OF FERRY COUNTY, WASHINGTON; PUBLIC UTILITY DISTRICT NO. 1 OF KITTITAS COUNTY, WASHINGTON; CENTRAL LINCOLN PEOPLE'S UTILITY DISTRICT, OREGON; CLATSKANIE PEOPLE'S UTILITY DISTRICT, OREGON; PUBLIC UTILITY DISTRICT NO. 3 OF MASON COUNTY, WASHINGTON; NORTHERN WASCO COUNTY PEOPLE'S UTILITY)

NOTICE OF APPEAL TO
U.S. SUPREME COURT

DISTRICT, OREGON; PUBLIC UTILITY)
DISTRICT NO. 1 OF PEND OREILLE)
COUNTY, WASHINGTON; TILLA-)
MOOK PEOPLE'S UTILITY DISTRICT,)
OREGON; VERA IRRIGATION DIS-)
TRICT NO. 15, WASHINGTON; CITY)
OF BANDON, OREGON; CITY OF)
BLAINE, WASHINGTON; CITY OF)
BONNERS FERRY, IDAHO; CITY OF)
BURLEY, IDAHO; CITY OF CANBY,)
OREGON; CITY OF CASCADE LOCKS,)
OREGON; CITY OF CENTRAILIA,)
WASHINGTON; CITY OF DRAIN,)
OREGON; CITY OF HEYBURN, IDAHO;)
CITY OF IDAHO FALLS, IDAHO;)
TOWN OF MCCLEARY, WASHING-)
TON; CITY OF MCMINNVILLE, ORE-)
GON; CITY OF MILTON-FREEWATER,)
OREGON; CITY OF PORT ANGELES,)
WASHINGTON; CITY OF RUPERT, ID-)
AHO; CITY OF SPRINGFIELD, ORE-)
GON; TOWN OF STEILACOOM,)
WASHINGTON; CITY OF SUMAS,)
WASHINGTON; ADLER MUTUAL)
LIGHT COMPANY, WASHINGTON;)
BENTON RURAL ELECTRIC ASSOCI-)
ATION, WASHINGTON; BIG BEND)
ELECTRIC COOPERATIVE, INC.,)
WASHINGTON; BLACHLY-LANE)
ELECTRIC COOPERATIVE ASSOCI-)
ATION, OREGON; CENTRAL ELECTRIC)
COOPERATIVE, INC., OREGON;)
CLEARWATER POWER COMPANY, ID-)
AHO; COLUMBIA BASIN ELECTRIC)
COOPERATIVE, INC., OREGON; CO-)
LUMBIA RURAL ELECTRIC ASSOCI-)
ATION, INC., OREGON; CONSUMERS)

NOTICE OF APPEAL TO
U.S. SUPREME COURT

POWER, INC., OREGON; COOS-
CURRY ELECTRIC COOPERATIVE,
INC., OREGON; DOUGLAS ELECTRIC
COOPERATIVE, INC., OREGON;
ELMHURST MUTUAL POWER &
LIGHT COMPANY, WASHINGTON;
FALL RIVER RURAL ELECTRIC CO-
OPERATIVE, INC., IDAHO; GLACIER
ELECTRIC COOPERATIVE, MONTANA;
HOOD RIVER ELECTRIC COOPERA-
TIVE, OREGON; IDAHO COUNTY
LIGHT & POWER COOPERATIVE AS-
SOCIATION, INC., IDAHO; INLAND
POWER & LIGHT COMPANY,
WASHINGTON; KOOTENAI ELECTRIC
COOPERATIVE, INC., IDAHO; LANE
ELECTRIC COOPERATIVE, INC., ORE-
GON; LINCOLN ELECTRIC COOPERA-
TIVE, INC., WASHINGTON; LOST
RIVER ELECTRIC COOPERATIVE,
INC., IDAHO; LOWER VALLEY POW-
ER & LIGHT, INC., WYOMING; MIDS-
TATE ELECTRIC COOPERATIVE, INC.,
OREGON; MISSOULA ELECTRIC CO-
OPERATIVE, INC., MONTANA; NESPE-
LEM VALLEY ELECTRIC COOPERA-
TIVE, INC., WASHINGTON; NORTH-
ERN LIGHTS, INC., MONTANA; OHOP
MUTUAL LIGHT COMPANY,
WASHINGTON; OKANOGAN COUNTY
ELECTRIC COOPERATIVE, INC.,
WASHINGTON; ORCAS POWER &
LIGHT COMPANY, WASHINGTON;
PARKLAND LIGHT & WATER COM-
PANY, WASHINGTON; PRAIRIE POW-
ER COOPERATIVE, INC., IDAHO;
RAFT RIVER RURAL COOPERATIVE,

NOTICE OF APPEAL TO
U.S. SUPREME COURT

INC., IDAHO; RAVALLI COUNTY ELECTRIC COOPERATIVE, INC., MONTANA; RURAL ELECTRIC COMPANY, IDAHO; SALEM ELECTRIC, OREGON; SALMON RIVER ELECTRIC COOPERATIVE, INC., IDAHO; TANNER ELECTRIC, WASHINGTON; UMATILLA ELECTRIC COOPERATIVE ASSOCIATION, OREGON; UNITY LIGHT & POWER COMPANY, WASHINGTON; VIGILANTE ELECTRIC COOPERATIVE, INC., MONTANA; WASCO ELECTRIC COOPERATIVE, INC., WASHINGTON; WELLS RURAL ELECTRIC COMPANY, NEVADA; WEST OREGON ELECTRIC COOPERATIVE, INC., OREGON; ERNST & WHINNEY, CPA'S; BLYTH, EASTMAN, PAINE, WEBBER, INC.; DONALD C. PATTERSON, III; STANLEY T. PARDO; PAINE, WEBBER, INC.; PAINE, WEBBER, JACKSON & CURTIS, INC.; R. W. BECK & ASSOCIATES; UNITED ENGINEERS & CONSTRUCTORS, INC.; EBASCO SERVICES, INC.; WOOD & DAWSON; HOUGHTON, CLUCK, COUGHLIN & RILEY; JOHN DOE AND RICHARD ROE, INC.,

Appellees,

and

Chemical Bank,

Appellee in its capacity as Bond Trustee.

NOTICE OF APPEAL TO U.S. SUPREME COURT

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Appellants American Express Travel Services Company, Inc.; American Express International Banking Corporation; Fireman's Fund Insurance Company; The American Insurance Company; Associated Indemnity Corporation (collectively "American Express Companies"); and United States Trust Company of New York, as Trustee, are appealing to the United States Supreme Court from the portion of the decision and order issued in this action on October 8, 1987, as corrected by the order dated February 17, 1987, which held that Wash. Rev. Code Section 21.20.430(7) (1986 Wash. Laws Ch. 304) does not violate the United States Constitution. This appeal is taken pursuant to 28 U.S.C. § 1257(2). DATED May 10th, 1988.

Respectfully submitted,

/s/ WALTER S. TABLER

Walter S. Tabler
Mark I. Crohn
Smith, Smart, Hancock,
Tabler & Middlebrooks
3800 Columbia Center
701 Fifth Avenue
Seattie, Washington 98104
(206) 624-7272
Attorneys for American Express
Companies, and United States
Trust Company of New York

Of Counsel to:

American Express Companies:
Stephen A. Weiner
David G. Keyko
Susan J. Kohlmann
Winthrop, Stimson,
Putnam & Roberts
40 Wall Street
New York, NY 10005

ATTACHMENT A

The Haberman Appellants include:

Fredric Haberman, M.D.; Claude Purvis; Nerou Cheng; Ted R. Pape; Aubrey L. Moss; John H. Biggs; Nicholas C. Dascoli; Arnold Goldberg; Frederick J. Gormley; Irving J. Gross; Rose Gross; Edward Kawash; Frank T. Kiel; Martin I. Schwartz; Kenneth C. Washburne; Jack B. Weinberger; Alice W. Wise; Lloyd W. Wise; Norma Sandison; Daniel Gelfond; Jeanne Christopher; John S. Christopher; Grace Freeman Rosen; Leo Freeman; George M. Hrunka; Charles M. Judge; The Morris County Savings Bank; Peter Madan; Peggy Ann Madan; Robert W. Madan; William A. Keyser; Marguerite E. Keyser; Marguerite E. Keyser, POA for Francis J. Herron; Merton S. Freeman; James Korsten, M.D.; Albert Baker; Barbara Jentis; Leigh E. Dunn; Rachel S. Dunn; Howard L. Ray; Daniel A. Berkoff; Albert B. Berkoff; George C. Ganzberg; Gabriel A. Calenda; Charles Zeidner; Corinne S. Corwin; Lucille Zager; Fay Freeman; Intramerica Life Insurance Company; Colonial Penn Life Insurance Company; Philadelphia Savings Fund Society; Regent Insurance Company; Reliance Insurance Company; Planet Insurance Company; Commonwealth Land Title Insurance Company; Criterion Insurance Company; Government Employees Insurance Company; The Broad Street National Bank of Trenton; Ronald Klinger; Robert Luban; Harleysville Mutual Insurance Company; Pennbank/Erie, formerly Security Peoples Trust Company; General Accident Insurance Company; Pennsylvania General Insurance Company; Camden Fire Insurance Association; Potomac Insurance Company of Illinois; Farmers State Savings Bank; Carson L. Shade; Mercantile National Bank of Indiana; David Fiske, M.D.; Albert W. Thompson, M.D.; Jack Schaefer; Robert L. Mast; Loretta Steinbach; Robert N. Wright; Jacob Malit; Doris Malit; Al Groschen; Marvin Neben; Shirley Neben; William C. Starrett, II; Arthur Brown; Arthur Brown, Trustee for 1979 Ethel Glazer Trust; Saul M. Ferman; Jack A. Schaps; Leon

Fein; Lawrence W. Pendelton; Imon R. Gammage; Lucy E. Gammage; Dave Rosenthal; Bernie Rosenthal; NCNB Bancorporation, Inc.; Philadelphia National Bank; Albert M. Grathwol and John D. Grathwol, Trustees of the Mr. & Mrs. Albert M. Grathwol Trust of 1981; Kira Fomenko; Abraham G. Luboff; Deborah R. Luboff; William D. Cane; Wemple State Bank; Brown County State Bank; Charles F. Deater; Albert Caponetto; Harold B. Hogle; G. Ralph Bartolme, Esq.; B.M. Behrends Bank; George Tomasini; Albert R. Cox; Norman L. Kaufman and Lillian Kaufman; Herbert L. Press; Coronado Bank; Cielo Vista Bank; Suburban Trust & Savings Bank; Farm Bureau Mutual Insurance Company of Michigan; J. Corlas Cole; Herbert Eckerling; Perrin H. Eckerling; Morrison Rutherford, M.D.; Central National Insurance Company of Omaha; William Randall Dawson; American Family Life Assurance Company of Columbus; Rockwood Insurance Company; SouthTrust Bank of Alabama, N.A., SouthTrust Bank of Marion County; Bank of Selma; SouthTrust Bank of Sand Mountain; SouthTrust Bank of Dothan; SouthTrust Bank of Baldwin County; SouthTrust Bank of Calhoun County; SouthTrust Bank of Etowah County; SouthTrust Bank of Huntsville; SouthTrust Bank of Mobile; Bank of Heflin; Mutual Service Casualty Insurance Company; Pennsylvania National Mutual Casualty Insurance Company; 1st Source Bank; Provident Alliance Life Insurance Company; Balboa Insurance Company; Henry L. Pohndorf; Modern Service Insurance Company; Dr. Wally Teuscher; Frank D. DeVol; Samual Lavine Trust; Rose Lavine Trust; Prudential Reinsurance Company; Prudential Property & Casualty Insurance Company; Progressive Casualty Insurance Company; North Carolina Farm Mutual Insurance Company; J. Bruce Forbes; Milton & Charlotte Forbes; Joel M. Davis; Ron Nelson; Charles M. Schulz; Edward P. Swain, Jr.; W.I. Osborne; Johanna Budman; Christine A. Simon; Peter Van Halen; Glenn R. Lawrence; Ernest E. Elmore; June T. Shepherd; Vincent De Sciose; Empire Fire & Marine Insurance Company; American States Insurance Company; American Economy Insurance Company; The Lincoln National Life

Insurance Company; Insurance Company of Illinois; Chicago Title Insurance Company; Peter M. Jordan; Neale Onstot; Esther Kaplan; Phyllis B. Zasloff; Patsy Riccardello; Myron Erdmann; Edythe Erdmann; Leo S. Guthman; Charles W. Mullenix; Margaret R. Just; Marshall S. Salkin, M.D.; Paul Doll, Trustee for Audrey B. Love; Wausau Insurance Companies; Employers Insurance of Wausau; Wausau Underwriters Insurance; Robert M. Carlton, M.D., The Hanover Insurance Co.; Citizens Insurance Co. of America; SteinRoe Tax Exempt Bond Fund; Bernadice A. Rischoff; Shirley M. Elliott; Robert N. Mayer; Dr. Raymond M. Chaitin; Sydney Vender; First Fidelity Bank; Robert Kunst; Milton Greenfield, Jr.; Catherine C. Swartchild as Trustee for James Swartchild UAD 10/25/62; Rose Kunst; Jack J. Irving; Florence Irving; David Bachner; Rita Bachner; George L. Kroll as Trustee for George L. Kroll Trust UAD 12/05/72; Michael Cudahy; Elizabeth Stein as Trustee of Living Trust; Jeanette S. Elliott as Trustee for Jeanette S. Elliott Trust; Helen F. Culver; Philip J. James; Edward S. Tushman, Trustee U/A 12/18/72, f/b/o Andrew P. Tishman; Edward S. Tishman U/A 01/20/82, f/b/o Andrew P. Tishman, Edward S. Tishman U/A 02/28/79, f/b/o Leslie Tishman; Lelan H. Menke; June R. Menke; Beatrice T. Kester; Michael Mullins; Maryea Mullins; Frank Williams; Bea Tanne Morris; James M. Maul; Beverly W. Maul; Max W. Strauss; Johh Farnam; Robert G. Farnam; Franklin W. Farnam; Edward Jacks; Jonathan S. Powell; John Verry; Jack Jay; A. Linc Lancet; Peoples National Bank of Washington, Executor for the Estate of John H. Sellen, deceased; W.J. Thomas Ferguson, Executor for the Estates of Mary Violet and William H. Ferguson, deceased; William B. Moroe; John R. Janet; Louise Shapiro; Robert J. Anderson; Barnet M. Daniels; Blanche Daniels; Merlin C. Perkins; Anthony Riccardello; William Hauptman; Dr. Alfred J. Cinelli; Union Safe Deposit Bank; Union Bank & Trust Company, N.A.; Gayle M. Schubach, trustee for Judy Radcliffe; Gayle M. Schubach, trustee for Henry Schubach; Gertrude Schwartz; Barnett Banks Trust Company, N.A., in various fiduciary and/or agency capacities;

W.T. Cummins; Midlantic National Bank; Midlantic National Bank/North; Joe Aggio; Rosalia Aggio; Florence Elliott; Florence Savin, Trustee for Madeline Hecht; Karl B. Kluge; Geraldine V. Kluge; Edward D. Meigs Trust, UDT dated 7/08/82; United Jersey Banks; Audobon Indemnity Company; United Guaranty Corporation; Garth Living Trust; Saul Haimowitz; Ruth Haimowitz; Westmount Properties; Saul Haimowitz, Inc., Employees Retirement Trust Fund; Textile Financial Corp.; Robert F. McMulty; Fred R. Jueneman or Rodney W. Jueneman, co-trustees UAD 9/14/77; Yale M. Leavy; Edwin L. Garthwaite; Arthur Hargrave; Eugene E. Koubeck; Richard L. Bakman; Lois Gregory; James P. Devere; Richard F. Hamilton; Jean Needham; William P. Allen; Helene P. Allen; Edward C. Forsyth; Ed Daniels; Richard Fuchslin; Helen Taylor; Worldwide Underwriters Insurance Company; E. Nicholas Sargent, M.D.

NOTICE OF APPEAL TO
U.S. SUPREME COURT

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

FREDRIC HABERMAN, M.D., ET AL., APPELLANTS, AND AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC.; AMERICAN EXPRESS INTERNATIONAL BANKING CORPORATION; FIREMAN'S FUND INSURANCE COMPANY; THE AMERICAN INSURANCE COMPANY; AND ASSOCIATED INDEMNITY CORPORATION, INTERVENORS-APPELLANTS, AND UNITED STATES TRUST COMPANY OF NEW YORK, AS TRUSTEE, INTERVENOR-APPELLANTS, V. WASHINGTON PUBLIC POWER SUPPLY SYSTEM, ET AL.,	No. 84-2-06452-8 AFFIDAVIT OF SERVICE OF INTERVENORS' NOTICE OF APPEAL TO THE U.S. SUPREME COURT

AFFIDAVIT OF SERVICE

Walter S. Tabler, being first duly sworn on oath, deposes and says:

1. I am one of the attorneys for American Express Travel Services Company, Inc., American Express International Banking corporation, Fireman's Fund Insurance Company, The American Insurance Company, Associated Indemnity Corporation, and United States Trust Company of New York.

2. Pursuant to Paragraphs 3 and 4 of this Affidavit, all parties required to be served have been served.

NOTICE OF APPEAL TO
U.S. SUPREME COURT

3. On May 10, 1988, I mailed a copy of the Intervenors' Notice of Appeal to the U.S. Supreme Court to the attorneys of record herein listed on Exhibit "B" attached hereto and made a part hereof by this reference.

4. On May 10, 1988, I caused a copy of Intervenors' Notice of Appeal to the U.S. Supreme Court to be hand delivered to the Office of Kenneth O. Eikenberry, Attorney General for the State of Washington, Highways-Licenses Bldg., Olympia, WA 98504.

/s/ WALTER S. TABLER
Walter S. Tabler

SUBSCRIBED AND SWORN TO before me this 9th day of May, 1988.

/s/ ILLEGIBLE

NOTARY PUBLIC in and for the State of Washington, residing in Mercer Island. My commission expires: 12-15-90

AFFIDAVIT OF SERVICE OF NOTICE
OF APPEAL TO U.S. SUPREME COURT

EXHIBIT B

Ferguson & Burdell
Mr. Christopher Kane
Mr. Scott R. Tucker
29th Floor, One Union Square
Seattle, Washington 98101

Jaffe & Schlesinger, P.A.
Mr. Robert H. Jaffe
Mr. Howard Schlesinger
8 Mountain Avenue
Springfield, New Jersey
07081-1788

Ginsburg, Feldman & Bress
Mr. Myer Feldman
Mr. Robert Deitz
Mr. Edward Tolchin
1250 Connecticut Ave. N.W.
Suite 800
Washington, D.C. 20036

Thoreson, Yost, Berry & Matthews
Mr. Ernest C. Matthews
825 Peoples Nat'l Bank Bldg.
Seattle, Washington 98171

Riddell, Williams, Bullitt & Walkinshaw
Mr. John D. Lowery
44th Floor, Seattle-First Nat'l Bank Building
Seattle, Washington 98154

Syrdal, Danelo, Klein & Myre
Mr. Peter Danelo
Mr. Otto Klein, III
Suite 2400—4th & Blanchard Bldg.
Seattle, Washington 98121

Gordon, Thomas, Honeywell, Malanca, Peterson & Daheim
Mr. Albert R. Malanca
Mr. Kenneth Keiffer
Mr. Donald Cohen
P.O. Box 1157
Tacoma, Washington 98401

Lane, Powell, Moss & Miller
Mr. Larry S. Gangnes
Mr. John R. Tomlinson
3800 Rainier Bank Tower
Seattle, Washington 98101

Halstead, Meyer & Knox
Mr. Dwight A. Halstead
P.O. Box 708
Prosser, Washington 99350

Williams, Lanza, Kastner & Gibbs
Mr. J. Kenneth McMullin
P.O. Box 21926
Seattle, Washington 98111

Pillsbury, Madison & Sutro
Mr. Dennis R. Bromley
Attorney at Law
P.O. Box 7880
San Francisco, California 94120

AFFIDAVIT OF SERVICE OF NOTICE
OF APPEAL TO U.S. SUPREME COURT

Smith & Rosellini
Mr. Jacob L. Smith
P.O. Box 632
Lynden, Washington 98264

Bennett & Bigelow
Mr. David A. Bennett
Ms. Elizabeth Blagg
Suite 1580—1111 Third Ave. Bldg.
Seattle, Washington 98101

Gelman, Couture & Pate
Mr. Herbert Gelman
1101 Fawcett—Suite 300
Tacoma, Washington 98402

O'Connor, Ludwigson, Thompson & Hayes
Mr. Edward B. O'Connor
P.O. Box 399
Bellingham, Washington 98227

Harris, Mericle, Orr & Bariault
Mr. Malcom S. Harris
Mr. Jack G. Orr
Suite 3210—First Interstate Ctr.
Seattle, Washington 98104

Ernst & Whinney
Mr. Emmett Eagan
2000 National City Center
Cleveland, Ohio 44114

Bogle & Gates
Mr. Ronald E. McKinstry
Bank of California Bldg.
Seattle, Washington 98164

Foster, Pepper & Riviera
Mr. Camden M. Hall
Mr. Stellman Keehnel
Mr. Daniel Thieme
Suite 3400, 1111 Third Ave. Bldg.
Seattle, Washington 98101

The Williams, Novack & Hansen Law Firm
Mr. Edward D. Hansen
P.O. Box 1077
Everett, Washington 98206

Rankin, McMurry, Vavrosky & Doherty
Mr. Peter R. Mersereau
1600 Benjamin Franklin Plaza
Portland, Oregon 97258

Johnson, Marceau, Karnopp & Peterson
Mr. R. L. Marceau
825 N.W. Bond Street
Bend, Oregon 97701-2799

Schwabe, Williamson, Wyatt, Moore & Roberts
Mr. Bernard M. Ryan
Mr. Rockne Gill
Mr. J. Laurence Cable
1211 S.W. Fifth Avenue
Suite 1600-1800 Pacwest Center
Portland, Oregon 97204-1082

AFFIDAVIT OF SERVICE OF NOTICE
OF APPEAL TO U.S. SUPREME COURT

Karr, Tuttle, Koch, Campbell,
Mawer & Morrow
Mr. John F. Kruger
1111 Third Avenue—Suite 2500
Seattle, Washington 98101

Schader, Harrison, Segal
& Lewis
Mr. Ralph Wellington
1600 Market Street, Suite 3600
Philadelphia, Pennsylvania 19103

Bullivant, Houser, Bailey,
Hanna, Pendergrass, Hoffman,
O'Connell & Goyak
Mr. R. Erick Johnson
Mr. Ronald E. Bailey
1400 Pacwest Center
Portland, Oregon, 97204-3797

Donovan, Leisure, Newton
& Irvine
Mr. Daniel R. Murdock
30 Rockefeller Plaza
New York, New York 10112

Nelle & Packer
Mr. Richard A. Nelle
P.O. Box 1570
Blaine, Washington 98230

Hillis, Clark, Martin
& Peterson
Mr. Michael F. Schumacher
Mr. Gregory E. Keller
500 Galland Building
1221 Second Avenue
Seattle, Washington 98101-1745

Mr. James P. McNally
Attorney at Law
P.O. Box 258
Ione, Washington 99139

Mr. Ronald J. English
Wash. Public Power Supply
System Office of Counsel
P.O. Box 968
Richland, Washington 99352

Platt, Irwin, Colley,
Oliver, Miller & Wood
Mr. Craig L. Miller
Mr. Bart Irwin
403 South Peabody
Port Angeles, Washington 98362

Betts, Patterson & Mines
Mr. Michael Mines
Mr. Carll Hagens
800 Financial Center
1215 Fourth Avenue
Seattle, Washington 98161

Reed, McClure, Moceri,
Thonn & Moriarty
Mr. Roy Moceri
3600 Columbia Center
701 Fifth Avenue
Seattle, Washington
98104-7007

AFFIDAVIT OF SERVICE OF NOTICE
OF APPEAL TO U.S. SUPREME COURT

Davis, Wright & Jones
Mr. Evan L. Schwab
2600 Century Square
1501 Fourth Avenue
Seattle, Washington 98154

Culp, Dwyer, Guterson
& Grader
Mr. Robert D. Stewart
2700 One Union Square
Seattle, Washington 98101

Schulte, Roth & Zabel
Mr. Irwin J. Sugarman
Mr. Roger Mead
900 Third Avenue
New York, New York 10022

Simpson, Thacher & Bartlett
Mr. James J. Hagan
Mr. Robert Woody
One Battery Park Plaza
New York, New York 10004

Sirianni & Yountz
Mr. Christopher Yountz
16th Floor—1111 Third Ave.
Seattle, Washington 98101

Mr. Ralph K. Nickerson
Attorney at Law
110 West Allyn Street
Goldendale, Washington 98620

Wheeler & Huss
Mr. Edwin Wheeler
P.O. Box 11287
Tacoma, Washington 98411

Helsell, Fetterman, Martin,
Todd & Hokanson
Mr. David F. Jurca
Ms. Linda J. Cochran
P.O. Box 21846
Seattle, Washington 98111

Levy, Schultz & Sweeney
Mr. James Levy
P.O. Box 891
Pasco, Washington 99301

AFFIDAVIT OF SERVICE OF NOTICE
OF APPEAL TO U.S. SUPREME COURT

APPENDIX G

LIST OF PARTIES

1. *Plaintiff-Intervenors:* American Express Travel Related Services Company, Inc., American Express International Banking Corporation, Firemen's Fund Insurance Company, The American Insurance Company, Associated Indemnity Corporation and United States Trust Company of New York, as Trustee.

2. *Plaintiffs:* Fredric Haberman, M.D., Claude Purvis, Nerou Cheng, Ted R. Pape, Aubrey L. Moss, John H. Biggs, Nicholas C. Dascoli, Arnold Goldberg, Frederick J. Gormley, Irving J. Gross, Rose Gross, Edward Kawash, Frank T. Kiel, Martin I. Schwartz, Kenneth C. Washburne, Jack B. Weinberger, Alice W. Wise, Norma Sandison, Lloyd W. Wise, Daniel Gelfond, Jeanne Christopher, John S. Christopher, Grace Freeman Rosen, Leo Freeman, George M. Hrunka, Charles M. Judge, The Morris County Savings Bank, Peter Madan, Peggy Ann Madan, Robert W. Madan, William A. Keyser, Marguerite E. Keyser, Marguerite E. Keyser, POA for Francis J. Herron, Merton S. Freeman, James Korsten, M.D., Albert Baker, Barbara Jentis, Leigh E. Dunn, Rachel S. Dunn, Howard L. Ray, Daniel A. Berkoff, Albert B. Berkoff, George C. Ganzberg, Gabriel A. Calenda, Charles Zeidner, Corinne S. Corwin, Lucille Zager, Fay Freeman, Intramerica Life Insurance Company, Colonial Penn Life Insurance Company, Philadelphia Savings Fund Society, Colonial Penn Insurance Company, Norma Sandison, Regent Insurance Company, Reliance Insurance Company, Planet Insurance Company, Commonwealth Land Title Insurance Co., Criterion Insurance Company, Government Employees Insurance Company.

3. *Defendants:* Washington Public Power Supply System; Public Utility District No. 1 of Benton County, Washington; Public Utility District No. 1 of Chelan County, Washington; Public Utility District No. 1 of Clallam County Washington; Public Utility District No. 1 of Clark County, Washington;

Public Utility District No. 1 of Cowlitz County, Washington; Public Utility District No. 1 of Douglas County, Washington; City of Ellenberg, Washington; Public Utility District No. 1 of Franklin County, Washington; Public Utility District No. 1 of Grant County, Washington; Public Utility District No. 1 of Grays Harbor County, Washington; Public Utility District No. 1 of Klickitat County, Washington; Public Utility District No. 1 of Lewis County, Public Utility District No. 1 of Mason County, Washington; Public Utility District No. 1 of Okanogan County, Washington; Public Utility District No. 1 of Pacific County, Washington; City of Richland, Washington; Public Utility District No. 1 of Skamania County, Washington; Public Utility District No. 1 of Snohomish County, Washington; City of Tacoma, Washington; Public Utility District No. 1 of Wahkiakum County, Washington; City of Seattle, Washington; Public Utility District No. 1 of Ferry County, Washington; Public Utility District No. 1 of Kittitas County, Washington; Central Lincoln People's Utility District, Oregon; Clatskanie People's Utility District, Oregon; Public Utility District No. 3 of Mason County, Washington; Northern Wasco County People's Utility District, Oregon; Public Utility District No. 1 of Pend Orielle County, Washington; Tillamook People's Utility District, Oregon; Vera Irrigation District No. 15, Washington; City of Bandon, Oregon; City of Blaine, Washington; City of Bonners Ferry, Idaho; City of Burley, Idaho; City of Canby, Oregon; City of Cascade Locks, Oregon; City of Centralia, Washington; City of Drain, Oregon; City of Heyburn, Idaho; City of Idaho Falls, Idaho; Town of McCleary, Washington; City of McMinnville, Oregon; City of Milton-Freewater, Oregon; City of Port Angeles, Washington; City of Rupert, Idaho; City of Springfield, Oregon; Town of Steilacoom, Washington; City of Sumas, Washington; Adler Mutual Light Company, Washington; Benton Rural Electric Association, Washington; Big Bend Electric Cooperative, Inc., Washington; Blachly-Lane Electric Cooperative Association, Oregon, Central Electric Cooperative, West Oregon Electric Cooperative Inc., Oregon; Clearwater Power Company, Idaho; Columbia Basin Electric Cooperative, Inc., Oregon; Columbia Rural Electric Association, Inc., Ore-

gon; Consumers Power, Inc., Oregon; Coos-Curry Electric Cooperative, Inc., Oregon; Douglas Electric Cooperative, Inc., Oregon; Elmhurst Mutual Power and Light Company, Washington; Fall River Rural Electric Cooperative, Inc., Idaho; Glacier Electric Cooperative, Montana; Hood River Electric Cooperative, Oregon; Idaho County Light & Power Cooperative Association, Inc., Idaho; Inland Power & Light Company, Washington; Kootenai Electric Cooperative, Inc., Idaho; Lane Electric Cooperative, Inc., Oregon; Lincoln Electric Cooperative, Inc., Washington; Lost River Electric Cooperative, Inc., Idaho; Lower Vally Power & Light, Inc., Wyoming; Midstate Electric Cooperative, Inc., Oregon; Missoula Electric Cooperative, Inc., Montana; Nespelem Valley Electric Cooperative, Inc., Washington; Northern Lights Inc., Montana; Ohop Mutual Light Company, Washington; Okanogan County Electric Cooperative, Inc., Washington; Orcas Power & Light Company, Washington; Parkland Light & Water Company, Washington; Prairie Power Cooperative, Inc., Idaho; Raft River Rural Electric Cooperative, Inc., Idaho; Ravalli County Electric Cooperative, Inc., Montana; Rural Electric Company, Idaho; Salem Electric, Oregon; Salmon River Electric Cooperative, Inc., Idaho; Tanner Electric, Washington; Umatilla Electric Cooperative Association, Oregon; Unity Light and Power Company, Washington; Vigilante Electric Cooperative, Inc., Montana; Wasco Electric Cooperative, Inc., Washington; Wells Rural Electric Company, Nevada; West Oregon Electric Cooperative, Inc., Oregon; Ernest & Whinney, CPA's; Blyth, Eastman, Paine, Webber, Inc.; Donald C. Patterson, III; Stanley T. Pardo; Paine, Webber, Inc.; Paine, Webber, Jackson & Curtis, Inc.; R. W. Beck and Associates; United Engineers and Constructors, Inc.; Ebasco Services, Inc.; Wood & Dawson; Houghton, Cluck, Coughlin & Riley; John Doe and Richard Roe, Inc.

4. *Additional defendant:* Chemical Bank in its capacity as Bond Trustee.

APPENDIX H

STATEMENT PURSUANT TO RULE 28.1

The parent, subsidiaries and affiliates of American Express Travel Related Services Company, Inc., American Express International Banking Corporation, Fireman's Fund Insurance Company, The American Insurance Company and Associated Indemnity Corporation (the "American Express Companies") are as follows:

As to American Express Travel Related Services Company

Parent:	American Express Company
Subsidiaries:	American Express do Brasil S.A. Turismo American Express (Thai) Co. Ltd. ACS AllCard Service Gesellschaft fuer Entwicklung und Anwendung automatisierter Zahlungssysteme mbH Societe Francaise Du Cheque De Voyage S.A. Travellers Cheque Associates Ltd. On-line Card Services, Ltd. American Express Financial Services, Ltd. American Express Group and Incentive Services, Inc.

As to Fireman's Fund Insurance Company and its subsidiaries, The American Insurance Company and Associated Indemnity Corporation

Parent:	Fireman's Fund Corporation
Subsidiaries:	Associated Indemnity Corporation is an indirect subsidiary of The American Insurance Company which, in turn, is a subsidiary of Fireman's Fund Insurance Company.

Fireman's Fund Insurance Company has no other subsidiaries or affiliates except wholly-owned subsidiaries.

As to American Express International Banking Corporation (predecessor in interest to American Express Bank Ltd.)

Parent:	American Express Company
Subsidiaries:	The Bancom Group, Inc.
	Egyptian American Bank
	Amtrade Holdings, Inc.
	Amtrade Partners S.A.
	Danaos Compania Naviera S.A.
	Trade Investment Shopping Centre, Ltd.
	S.I. Les Charmes-9
	Sociedad Del Desarrollo Mercantil Ltda.
	Arrendamento Mercantil
	Anangel-American Shipholdings Limited
	Poliarco Management A.G.
	Poliarco S.A.
	Hethersett Investments Ltd.
	Vitaglade Limited
	Verronworth Limited
	England Properties Limited
	Picadilly Investment Property Limited
	Inversiones ICC Limitada
	Sociedad Quimica y Minera de Chile S.A.
	Agricola Las Dos Mercedes Limitada
	Agricola Amalia de Paine Limitada
	Agricola Santa Filomena de Huelquen Limitada
	Complejos Tursticos Huatulco S.A. de C.V.
	Compania Hotelera Regiomontana S.A. de C.V.
	Turistica Cancun, S.A. de C.V.
	Empresas Turisticas Integradas, S.A. de C.V.
	Petrolina-Participacoes Agricolas S.A.

NAL Merchant Bank Limited
AMP-Amex Leasing Limited
Arrendadora Comercial-Amex, S.A. de C.V.
BOC-Amex Leasing Limited
Ultramex S.A. - Arrendamento Mercantil
Witan Enterprises Inc.
Woodmere Enterprises, Inc.
P.T.-BNI Amex Leasing
American Express Financial Services Limited
Bexim International S.A.
KOC-Amerikan Bank S.A.
Pacific Bank Berhad
Amex Distribuidora De Tituols E Valores Mobiliarios Ltda.
Amex Capital Investments (UK) Limited
The International Corporate Bank, Inc.
Albion Trust Holdings Limited
Grahams Rintoul Investment Trust P.L.C.
Grahams Rintoul & Company Limited

Affiliates of the American Express Companies

IDS Financial Corporation

Shearson Lehman Hutton Holdings Inc.

None of the American Express Companies has any other subsidiaries or affiliates except wholly-owned subsidiaries.

The parents, subsidiaries and affiliates of United States Trust Company ("U.S. Trust") are as follows:

Parent:	U.S. Trust Corporation
Subsidiaries:	Foreign & Colonial Asset Management (50%)
	Financial Technologies International, Inc. (87.5%-owned)

Neither U.S. Trust nor U.S. Trust Corporation has any other subsidiaries or affiliates except wholly-owned subsidiaries.

(2)

Supreme Court, U.S.
FILED
JUL 18 1988
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CLERK

No. 87-1889

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC., *et al.*,

Appellants,

vs.

WASHINGTON PUBLIC POWER SUPPLY SYSTEM, *et al.*,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF WASHINGTON

MOTION TO DISMISS OR AFFIRM

ALBERT R. MALANCA*
KENNETH G. KIEFFER
DONALD S. COHEN
ELIZABETH PIKE MARTIN
GORDON, THOMAS, HONEYWELL, MALANCA, PETERSON & DAHEIM
2200 First Interstate Plaza
Tacoma, Washington 98401
(206) 572-5050
Attorneys for Appellees City of Ellensburg, WA et al.

*Counsel of Record

(Other Appellees Joining This Motion and Their Respective Counsel are Listed at the End of This Brief)

QUESTIONS PRESENTED

(1) Does 28 U.S.C. § 1257(2) confer jurisdiction upon this Court to hear an appeal of an order of a state's highest court upholding a statute of that state against a federal constitutional challenge:

(a) where the order of the state's highest court remands the case for further proceedings, and thus is not on its face a final judgment or order of that court; and

(b) where the order of the state's highest court cannot possibly fit any of the exceptions to the final order rule under the doctrine of *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975)?

(2) Does a ruling by the highest court of a state, upholding a statute of that state against an Equal Protection challenge, present a substantial federal question, where:

(a) the parties asserting the challenge are not within the group the statute purportedly excludes;

(b) the statute was enacted to conform state law to federal law standards and to provide protection for public issuers of securities; and

(c) the reviewing court found a number of rational bases for the distinction?

(3) Does a ruling by the highest court of a state, upholding a statute against a Commerce Clause challenge, present a substantial federal question, where:

(a) the parties asserting the challenge do not have any distinct and palpable injury traceable to the alleged burden on interstate commerce, and are not persons allegedly affected by the statutory distinctions;

(b) the statute does not seek to regulate commerce and has no practical effect on interstate commerce; and

(c) the statute was enacted in furtherance of a legitimate local public interest?

(4) Does a ruling by the highest court of a state, upholding a statute of that state against a Due Process challenge, present a substantial federal question, where:

(a) the statute did not alter an existing judgment, but merely clarified the standard of culpability in an existing cause of action; and

(b) the statute was enacted through a public legislative process in which the challenging parties had an opportunity to participate and be heard?

PARTIES BELOW

The list of parties to this appeal may be found at page 136A of the Appendix to the Jurisdictional Statement of the Appellants, and is incorporated herein by reference.

STATEMENT PURSUANT TO RULE 28.1

The Statement Pursuant to Rule 28.1 may be found in an attachment to this brief.

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No. 87-1889

IN THE

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OCTOBER TERM, 1987

AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC., *et al.*,

Appellants,

vs.

WASHINGTON PUBLIC POWER SUPPLY SYSTEM, *et al.*,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF WASHINGTON

MOTION TO DISMISS OR AFFIRM

Appellees[1] move this Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of Washington on the grounds that the purported federal questions raised on this appeal are so insubstantial as to require no further argument.

[1] Appellee-defendants joining this motion are listed at the end of this brief, along with their counsel. All appellees joining in this motion are also joining in a companion motion to dismiss another appeal from the same order and decision filed by certain other plaintiffs, Fredric Haberman, *et al.* v. Washington Public Power Supply System, *et al.*, No. 87-1897.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Appellant-Intervenors assert jurisdiction for this appeal under 28 U.S.C. § 1257(2), which provides:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:
>
> * * *
>
> (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

Appellant-Intervenors challenge the validity of Wash. Rev. Code § 21.20.430(7)(1987), generally known as the "Scienter Amendment", which states:

> Notwithstanding subsections (1) through (6) of this section, if an initial offer or sale of securities that are exempt from registration under RCW 21.20.310 is made by this state or its agencies, political subdivisions, municipal or quasi-municipal corporations, or other instrumentality of one or more of the foregoing and is in violation of RCW 21.20.010(2), and any such issuer, member of the governing body, committee member, public officer, director, employee, or agent of such issuer acting on its behalf, or person in control of such issuer, member of the governing body, committee member, public officer, director, employee, or agent of such person acting on its behalf, materially aids in the offer or sale, such person is liable to the purchaser of the security only if the purchaser establishes scienter on the part of the defendant. The word "employee" or the word "agent," as such words

> are used in this subsection, do not include a bond counsel or an underwriter. Under no circumstances whatsoever shall this subsection be applied to require purchasers to establish scienter on the part of bond counsels or underwriters. The provisions of this subsection are retroactive and apply to any action commenced but not final before July 27, 1985. In addition, the provisions of this subsection apply to any action commenced on or after July 27, 1985.

Wash. Rev. Code § 21.20.010(2)(1987) provides:

> It is unlawful for any person, in connection with the offer, sale or purchase of any security, directly or indirectly:
>
> * * *
>
> (2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading.

Thus, the statute at issue here merely clarifies when "scienter" must be proven to recover any damages allegedly arising from a violation of Wash. Rev. Code § 21.20.010(2).

Appellant-Intervenors assert that the Scienter Amendment violates U.S. Const., Art. l, Section 8, Clause 3, which provides:

> The Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

Appellant-Intervenors further assert that the Scienter Amendment violates U.S. Const., Amend. XIV, Section 1, which provides:

> [N]or shall any state deprive any person of . . . property, without due process of law.
>
> * * *
>
> [N]or deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

Appellants, the American Express Companies and United States Trust Company ("Intervenors"), are intervenors in a lawsuit pending in the Washington state courts. They seek to recover losses that allegedly arose due to misrepresentations made in connection with the sale of municipal bonds issued by the Washington Public Power Supply System (the "Supply System"), a municipal corporation organized under the laws of the state of Washington. The Supply System issued the bonds between 1977 and 1981 in the principal amount of $2.25 billion to finance the construction of two nuclear projects for electricity generation in the state of Washington (the "Projects"). Intervenors purchased approximately $360 million of these bonds.

The Bond Resolution, pursuant to which the bonds were issued and sold, provided that debt service obligations on the bonds would be satisfied under the terms of certain "Participants' Agreements." The Participants' Agreements were agreements between the Supply System and 88 public utility entities in the Pacific Northwest (the "Participants"). These agreements provided for the purchase of shares of the generating "capability" of the Projects. If the Projects were completed, the Supply System would pay debt service by selling the Projects' electricity to the Participants. In addition, the Participants' Agreements provided that, if the Projects were not completed, the Participants would pay the debt service obligations according to the same share formula under which they had agreed to purchase electricity. Because the Supply System terminated construction on the Projects in January of 1982, when the Projects were still far from complete, this second prong of the Participants' Agreements came into play.

Shortly after the termination of the Projects in January, 1982, Chemical Bank, Trustee for the Projects' bond fund, filed a declaratory judgment action in the Washington state courts seeking a declaration that the Participants' Agreements were valid and enforceable. On June 15, 1983, the Supreme Court of Washington held certain of the Participants' Agreements void

ab initio. *Chemical Bank v. WPPSS*, 99 Wash. 2d 772, 666 P.2d 329 (1983). This decision hinged on a legal finding that it was an *ultra vires* act for the Washington municipal Participants to enter the Participants' Agreements. On November 6, 1984, the Supreme Court of Washington reaffirmed this *ultra vires* decision, and then held all the other Participants' Agreements unenforceable on the grounds of mutual mistake and commercial frustration. *Chemical Bank v. WPPSS*, 102 Wash. 2d 874, 691 P. 2d 524 (1984), *cert. denied*, 471 U.S. 1065 (1985). As a result of these decisions, no funds were available to the Supply System to make the required payments on the bonds, and a payment default ensued.

Intervenors filed their first so-called "complaint in intervention" in November of 1984. The Washington state action into which they intervened, *Haberman v. Washington Public Power Supply System*, Superior Court for King County, Washington, No. 84-2-06452-8, had commenced in May of 1984. Prior to that time, several securities fraud class-actions on behalf of Supply System bond purchasers had already been commenced in the federal courts. Numerous federal class-actions have since been consolidated in a multi-district proceeding (the "MDL-551" case), and two classes of bond purchasers have been certified. MDL-551 is set to begin trial on September 7 of this year in Tucson, Arizona, with The Honorable William D. Browning of the District of Arizona presiding. All of the misrepresentation claims pursued by Intervenors are present in the MDL-551 federal class-action. As Intervenors admit (Intervenors' Jurisdictional Statement, p. 9), they are members of at least one of the plaintiff classes in MDL-551.

Intervenors have eleven (11) alleged counts in their complaint, including a claim against Chemical Bank as bond fund Trustee, several so-called derivative claims, claims for damages under Washington's Consumer Protection Act and New York's General Business Law, and claims for common law fraud and negligent misrepresentation. The only claims in Intervenors' complaint that are in issue on this purported appeal arise under the Washington State Securities Act ("WSSA") Wash. Rev. Code

§ 21.20.010 *et seq.* (1987). This Act permits private lawsuits for violations of certain of its provisions under limited circumstances. A brief review of the relevant provisions of WSSA, and some of the pertinent legislative history, will highlight the issues that Intervenors pursue here.

WSSA is a relatively standard collection of statutory provisions governing the purchase, sale or issuance of securities in the state of Washington. Like most such state regulatory schemes, it parallels the federal securities laws to a large extent. Under Wash. Rev. Code § 21.20.010, certain types of acts are specifically forbidden in the purchase or sale of securities. Wash. Rev. Code. § 21.20.430 is a provision that permits private actions in the event of a violation of Wash. Rev. Code § 21.20.010. Intervenors have two claims under Section 21.20.430, one for primary liability under Section 21.20.430(1), and the other charging secondary liability under Section 21.20.430(3).

Prior to 1980, it was commonly understood that recovery in a private action under WSSA required proof of fraud, *i.e.* proof that a violation was committed with intent to defraud, or with scienter. *See, e.g., Ludwig v. Mutual Real Estate Investors*, 18 Wash. App. 33, 567 P.2d 658 (1977). But in *Kittilson v. Ford*, 93 Wash.2d 223, 608 P.2d 264 (1980), the Washington Supreme Court held that under some circumstances scienter need *not* be proven for a violation of Wash. Rev. Code § 21.20.010(2), which provides:

> It is unlawful for any person, in connection with the offer, sale or purchase of any security, directly or indirectly:
>
> * * *
>
> (2) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading.

The basic rationale offered in *Kittilson* for not requiring proof of scienter for a violation of this provision appears to have been simply that this provision did not use the words "fraud" or "defraud".

Concerned that public servants could be held liable for simple negligence under this newly announced standard, the Washington legislature promptly enacted a "Scienter Amendment" to WSSA. This amendment insured that a scienter standard would apply to WSSA claims related to the securities of certain Washington public entities. As originally enacted in 1981, the Scienter Amendment provided:

> [I]f an initial offer or sale of securities by the state or its agencies is in violation of RCW 21.20.010(2), each member of the governing body or person in control of the state or agency, each committee member, public officer, or director acting on its behalf, and each employee thereof who materially aids in the offer or sale, are liable to the purchaser of the security only if the purchaser establishes scienter on the part of the defendant.

(Wash. Laws of 1981, ch. 272, § 9(7).) Thus, the new statute mandated that when a security was issued by the state or one of its agencies, a scienter standard would apply to any WSSA claim arising out of that issue and directed at certain persons or entities related to the issuer.

In 1985, the Washington state legislature broadened this scienter requirement. (Wash. Laws of 1985, ch. 171, § 1(7).) This 1985 amendment changed the scienter requirement as follows:

> – It broadened the class of public issuers covered by the provision by adding "political subdivisions, municipal or quasi-municipal corporations, or other instrumentality of one or more of the foregoing";
>
> – It added the municipal issuer itself and the "agents" of the issuer to the list of persons to whom the scienter standard applies;

– It restricted the provision to apply only to municipal issues "exempt from registration under RCW 21.20.310," in keeping with the well-established statutory distinctions related to municipal securities; and

– It expressly excluded bond counsel and underwriters from the scienter standard.

This was where the law stood in October of 1985, when the state trial court dismissed Intervenors' entire complaint on the grounds that none of its counts stated a cognizable cause of action. (The trial court's oral decision and subsequent written order and judgment appear in the Intervenors' Appendix to their Jurisdictional Statement at pp. 87a-104a.) This dismissal decision then came before the Supreme Court of Washington on direct appeal. In the Washington Supreme Court, Intervenors challenged the constitutionality of the Scienter Amendment, and also disputed almost every other aspect of the trial court's dismissal decision. On October 8, 1987, the Supreme Court of Washington reversed the trial court's dismissal decision on a number of grounds. While the Washington Supreme Court upheld the constitutionality of the Scienter Amendment, it reinstated Intervenors' WSSA claims, as well as their claims for common law fraud and negligent misrepresentation. The court then remanded the case for further proceedings consistent with its opinion. *Haberman v. Washington Public Power Supply System*, 109 Wash.2d 107, 744 P.2d 1032 (1987), *modified and further reconsideration denied*, ____ Wash.2d ____, 750 P.2d 254 (1988).[2]

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[2] Between the trial court decision and the Washington Supreme Court decision, the Washington legislature amended the Scienter Amendment again, but only to make it clear that it applied retroactively (the "Retroactivity Amendment"). (Wash. Laws of 1986, ch. 304, § 7.) The version of the Scienter Amendment reviewed by the Washington Supreme Court, and thus the version before this Court, is the current law which contains the retroactive implementation language.

ARGUMENT

I.

THIS COURT LACKS JURISDICTION TO HEAR THIS PURPORTED APPEAL BECAUSE THE ORDER AT ISSUE IS MANIFESTLY NOT FINAL.

Intervenors purportedly bring this appeal under 28 U.S.C. § 1257(2), which grants jurisdiction to this Court to hear appeals of certain "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had." But the decision in this case does not contain a "final" order or judgment. Although the Washington Supreme Court upheld the constitutionality of the Scienter Amendment, the decision on Intervenors' WSSA claims clearly permits them to pursue those causes of action on remand. Likewise, Intervenors can freely pursue their reinstated common law fraud claim, as well as their negligent misrepresentation claim. Success on any of these remanded claims could result in complete recovery for Intervenors and would entirely moot the issue Intervenors pursue here. Accordingly, this case is not ripe for review, and this appeal should be dismissed.[3]

A. The Washington Supreme Court's Order Is Not Final On Its Face.

The Washington Supreme Court remanded several of Intervenors' claims for trial, and thus clearly did not render a decision that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Stringfellow v. Concerned Neighbors in Action*, __ U.S. __, 107 S. Ct. 1177, 1181 (1987), *quoting Catlin v. United States*, 324 U.S. 229, 233 (1945).

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[3] Dismissal of this appeal and the companion appeal would mandate dismissal of the cross-appeal of defendant Wood Dawson Smith & Hellman, since they have asserted no basis for this Court's jurisdiction over their cross-appeal other than the existence of the primary appeals. (*See* Wood Dawson Jurisdictional Statement on Cross-Appeal, pp. 6-7.)

Intervenors nevertheless seek to invoke this Court's appellate jurisdiction under the doctrine of *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975). But the doctrine of that case demands that any prospective appeal satisfy a set of specific criteria. Intervenors are simply unable to fit the facts of their case within the *Cox* standards.

B. The *Cox Broadcasting* Doctrine Does Not Apply To This Order.

In *Cox Broadcasting*, this Court recognized four narrow exceptions to the requirement of strict finality. 420 U.S. at 476-87. Intervenors urge this Court to find jurisdiction within the second and the fourth exceptions identified in *Cox Broadcasting*. But the facts of this case do not fit either of those *Cox* exceptions.[4]

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[4] In *Cox*, this Court enumerated the following four situations in which it would review a non-final order of a state's highest court deciding a federal issue:

> 1. Where further proceedings have yet to occur, but the federal issue, as decided by the state's highest court, preordains the outcome of those proceedings, making the case "final" for all practical purposes. 420 U.S. at 479 ("the first *Cox* exception").
>
> 2. Where the federal issue will necessarily survive and require review, regardless of the eventual outcome of the state proceedings. *Id.* at 480 ("the second *Cox* exception").
>
> 3. Where the federal question could never again be reviewed by this Court, no matter what the outcome of the state proceedings. *Id.* at 481 ("the third *Cox* exception").
>
> 4. Where: (a) reversal by this Court on the federal issue would be preclusive of any further litigation; and (b) the state court decision might seriously erode federal policy. *Id.* at 482-83 ("the fourth *Cox* exception").

1. *The Present Case Does Not Fall Within The Second* Cox Broadcasting *Exception Because The Federal Issue Will Not Necessarily Survive After Further State Proceedings.*

Intervenors first assert that this case falls into the second *Cox* exception to strict finality, arguing that there "is a federal issue which has been 'finally decided by the highest court in the State' and which 'will survive and require decision regardless of the outcome of further state court proceedings.' " (Intervenors' Jurisdictional Statement, p. 3, *quoting Cox*, 420 U.S. at 480.) This statement is incorrect. Intervenors would have no reason to challenge the Scienter Amendment if they prevailed at trial using the higher standard of culpability of that legislation. Moreover, Intervenors could win on several other claims in their complaint. Because further state court proceedings could yet render review of Intervenors' constitutional claims unnecessary, the second *Cox* exception to finality does not apply to this case.

It is also noteworthy that this Court defined the second *Cox* exception with reference to cases where a defendant needs protection from immediate harm.[5] This factor further distinguishes the present case, since Intervenors, who are plaintiffs, are not being forced to give up control of any property or endure a trial that might endanger their civil liberties. Indeed, Intervenors demonstrate no special hardship indicating that expedited review would be appropriate in this case. Intervenors have manifestly not met the second *Cox* exception as a basis for this Court's jurisdiction.

2. *The Present Case Does Not Fall Within The Fourth* Cox Broadcasting *Exception Because Reversal On The Federal Question Will Not Be Preclusive Of Further Litigation, And Because The Order In Issue Involves No Erosion Of Federal Policy.*

Intervenors also appear to base their jurisdictional statement on the fourth *Cox* exception. To fit under the fourth exception,

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[5] The cases cited by this Court in *Cox Broadcasting* in support of the second category all arguably involve elements of immediate hardship. Wright, Miller, *(Footnote continued)*

an appellant has to show *both* (1) that "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action," *and* (2) that "a refusal immediately to review the state court decision might seriously erode federal policy." 420 U.S. at 482-83. Intervenors do not even argue that they meet these necessary criteria. Instead, they merely assert that "delay of review . . . will leave the securities market in Washington operating under a 'rule of law and a statute the constitutionality of which is in serious doubt'." (Intervenors' Jurisdictional Statement, p. 3, *quoting Cox* 420 U.S. at 485-86.)

In the first place, there is little doubt, let alone "serious doubt," on the constitutional question. A Washington state trial court, the Washington Supreme Court, and now Judge Browning in the federal class-action, MDL-551, have all held that the Scienter Amendment is constitutional. *See In re WPPSS Securities Litigation*, MDL No. 551 (W.D. Wash. June 13, 1988). There is thus much less "doubt" here than Intervenors would presume.

In any case, mere "doubt" as to a constitutional issue, which could justify any number of advisory requests, has never been a basis for invoking this Court's jurisdiction. That is why this Court never identified "doubt" as to a law's constitutional validity as an independent factor in *Cox*. The passage of *Cox* cited by Intervenors – concerning "serious doubt" on a constitutional question – is pure dicta. Such a concern is applicable, if at all, only to the second element of the fourth *Cox* exception – whether there will be a serious erosion of federal policy.

Intervenors do not contend, as they could not, that any erosion of federal policy is at risk here. This is certainly not a case where First Amendment rights will be chilled if the state decision is left unreviewed. *Cf. Cox*, 420 U.S. at 485-86. Nor is this a case where a federal statutory scheme will be undermined if an incorrect state court decision is left standing. *Cf. Southland*

Cooper & Gressman, *Federal Practice and Procedure: Jurisdiction* § 4010. Commentators suggest that this category makes more sense with such a requirement. *Id.*

Corp. v. Keating, 465 U.S. 1, 6-7 (1984)(Federal Arbitration Act); *Hudson Distributors, Inc. v. Eli Lilly & Co.*, 377 U.S. 386, 395 (1964) (Sherman Act); *Mercantile National Bank v. Langdeau*, 371 U.S. 555, 558-62 (1963)(National Banking Act). To the contrary, the Washington Supreme Court decision requires Appellants to try their state law securities claims under a scienter standard of proof *consistent* with the federal securities law scheme. *See Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193, *rehearing denied*, 425 U.S. 986 (1976) (scienter is an essential element of a federal securities law fraud claim under § 10(b) of the Securities Exchange Act of 1934).

In any event, even if "doubt" satisfied the second element of the fourth *Cox* exception, Intervenors cannot satisfy the first element — that a reversal by this Court would be preclusive of further litigation. This first element *must* be satisfied to meet the fourth *Cox* exception. *Cox*, 420 U.S. at 482-83; *accord Southland Corp.*, 465 U.S. at 6-7. Here, it manifestly is not.

The resolution of Intervenors' constitutional claims "can await final judgment without any adverse effect upon important federal interests. A contrary conclusion would permit the fourth [*Cox*] exception to swallow the rule." *Flynt v. Ohio*, 451 U.S. 619, 622 (1981). This appeal should be dismissed.

II.

THE INTERVENORS LACK STANDING TO RAISE EQUAL PROTECTION AND COMMERCE CLAUSE CLAIMS.

Litigants must normally assert their own legal interests, rather than those of a third party. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985). Where a party is not adversely affected by the part of a statute it seeks to challenge, it lacks standing to do so. *Jones v. Preuit & Mauldin*, 822 F.2d 998, 1006 (11th Cir. 1987). That is precisely the situation pertaining to the Intervenors' Equal Protection and Commerce Clause claims, and they therefore lack standing to pursue these claims.

Intervenors try to raise an Equal Protection challenge to the Scienter Amendment based on the fact that it differentiates bond counsel and underwriters from other prospective defendants. But Intervenors are not bond counsel or underwriters, and are not adversely affected by the exemption of bond counsel and underwriters from the scienter requirement. In fact, the Intervenors are benefited by a negligence, rather than scienter, standard for those entities.

Similarly, Intervenors do not have standing to raise an Equal Protection or Commerce Clause challenge to the distinction between in-state and out-of-state bond issues. All bonds in question were issued by the Supply System, a municipal corporation of the State of Washington. There are no non-Washington issuers involved in this case or this appeal. Thus, Intervenors are not adversely affected by any asserted unconstitutional distinction in this respect.

This Court has "narrowly limited the circumstances in which one party will be given standing to assert the legal rights of another." *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 80 (1978). "Even when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, this Court has-held that the plaintiff must assert ***his own legal rights and interests***, and cannot rest his claim to relief on the legal rights or interests of third parties." *Id.*, *quoting Warth v. Seldin*, 422 U.S. 490, 499 (1975)(emphasis added).

The requirement of standing is constitutionally based. Thus, "[a] plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751, *rehearing denied*, 468 U.S. 1250 (1984), *citing Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982). The injury alleged must be distinct and palpable, and not abstract, conjectural or hypothetical. *Id.*, at 751.

Intervenors assert that the Scienter Amendment's alleged impermissible burden on interstate commerce has "directly harmed" them. But they recite no facts which would support an

inference of any harm, direct or indirect. Accordingly, the Court should reject Intervenors' Equal Protection and Commerce Clause challenges to the Scienter Amendment for lack of standing.[6]

III.

THE SCIENTER AMENDMENT DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE.

Intervenors contend that the provision in the Scienter Amendment stating that bond counsel and underwriters are not within the ambit of the scienter requirement unconstitutionally singles out a class for special treatment.[7] Intervenors further contend that the limitation in the Scienter Amendment to situations involving bonds issued by the State of Washington or its political subdivisions unconstitutionally distinguishes between in-state and out-of-state bond issues and, as a result, violates both the Equal Protection Clause and Commerce Clause. Neither argument provides a jurisdictional basis for consideration by this Court.

Even if the standing barriers demonstrated above could be overcome, Intervenors assert no substantial federal question. The

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[6] The cases cited by Intervenors do not support the proposition that they may raise other constitutional issues without standing to do so. In *Federal Communications Commission v. Sanders Brothers Radio Station*, 309 U.S. 470 (1940), this Court upheld a radio station licensee's standing to object to the FCC's grant of a license to a competitor because *Congress had conferred legislative standing* to the licensee. 309 U.S. at 477. Furthermore, in *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59 (1978), this Court did *not* abandon the constitutional requirement that there be a causal link between the alleged injury and the challenged conduct. *See* 438 U.S. at 78.

[7] Appellees note that Wood Dawson filed a cross-appeal on the issue of Equal Protection. Appellees do not intend to file a separate response to Wood Dawson's cross-appeal, but the arguments in this response will apply to the Wood Dawson submission where appropriate.

Scienter Amendment, of course, is clothed in a presumption of constitutionality. Intervenors bear the heavy burden of showing that the Scienter Amendment is unconstitutional. *McGowan v. Maryland*, 366 U.S. 420, 425-26 (1961). They have not and cannot satisfy this standard.

A. The Scienter Amendment Does Not Single Out Bond Counsel And Underwriters For Special Treatment.

An Equal Protection claim requires at the outset that a class be singled out for separate treatment from all other similarly situated persons or entities. *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985); *Plyler v. Doe*, 457 U.S. 202, 216, *rehearing denied*, 458 U.S. 1131 (1982). That is not the case here. The Scienter Amendment imposes a scienter standard in actions against the following defendants:

> (1) an issuer, when the issuer is the State, its agencies, political subdivisions, municipal or quasi-municipal corporations, or other instrumentality of the above; and
>
> (2) a member of the governing body, committee member, public officer, director, employee, or agent of such issuer acting on its behalf; and
>
> (3) a person in control of (1) or (2).

Wash. Rev. Code § 21.20.430(7). *For any other person or entity*, the standard for liability continues to be negligence, not scienter. The Scienter Amendment also provides clarification of the definitions of "employee" and "agent" as used in the statute, by stating that bond counsel and underwriters are not to be considered "agents" or "employees" for purposes of the scienter requirement. *Id.*

The Scienter Amendment, thus, does not single out bond counsel and underwriters for special treatment. The statute does not require that scienter be proved against everyone other than

bond counsel or underwriters. Rather, it provides the "protection" of a scienter requirement to the limited class of entities and persons typically most closely associated with the issuer of securities, and excludes all others. Thus, Intervenors have failed to establish the principal underpinning for their Equal Protection claim – that the State of Washington created a distinction between bond counsel and underwriters on the one hand, and other similarly situated persons involved in the process of issuing municipal securities.[8]

B. Intervenors Have Failed To Meet The Heavy Burden Of Showing That The Scienter Amendment Lacks Any Conceivable Rational Relationship To A Legitimate State Interest.

Even if Intervenors could satisfy the requirement that they were singled out from all others for special treatment, they must then – and cannot – prove that: 1) the State of Washington has no legitimate interest in providing the "protection" of a scienter requirement to the specified group of defendants, and 2) the Scienter Amendment bears no conceivable rational basis to that legitimate state interest.

Intervenors concede that the Scienter Amendment does not affect fundamental rights or involve suspect classifications. Therefore, it does not violate the Equal Protection Clause if its classifications bear any rational relationship to a legitimate state interest. *City of Cleburne v. Cleburne Living Center*, 473 U.S.

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[8] Intervenors' contention that bond counsel and underwriters are singled out for discrimination under the Scienter Amendment because they are politically unpopular groups, citing *United States Dep't of Agriculture v. Moreno*, 413 U.S. 528 (1973), borders on the frivolous. In *Moreno*, this Court struck down an amendment preventing "hippies" from receiving food stamps. Any analogy to alleged discrimination here against "New York bond counsel and Wall Street underwriters," *see* Intervenors' Jurisdictional Statement at 21, is at best illusory.

432, 440 (1985).[9] Classifications are to be set aside on Equal Protection grounds "only if they are based solely on reasons totally unrelated to the pursuit of the State's goals and only if no grounds *can be conceived* to justify them." *Clements v. Fashing*, 457 U.S. 957, 963, *rehearing denied*, 458 U.S. 1133 (1982)(emphasis added). Therefore, Intervenors must show that the Scienter Amendment was wholly without a conceivable legitimate purpose or state interest.

The Scienter Amendment was enacted to reinstate the long-standing scienter requirement for actions against public issuers of securities (*see* pp. 6-8, *supra*), and to conform Washington law to federal securities laws in this respect. *See* Wash. Rev. Code § 21.20.900 (1987). The clear and legitimate state interest in such a standard is the protection of those persons and entities who are serving in the public interest, thus encouraging their service to the public and thereby facilitating the issuance of municipal securities. A scienter standard helps ensure that this public purpose will be served and that persons well-qualified for public office will not be deterred from service. The facilitation of the issuance of municipal securities for necessary public projects is clearly a legitimate state interest.

Having established the legitimate purpose, "the state law stands as long as the burden it imposes is found to be rationally related to that purpose, *a relationship that is not difficult to establish.*" *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 881, *rehearing denied*, 471 U.S. 1120 (1985) (emphasis added). Any conceivable rational basis for an allegedly impermissible statutory distinction will sustain the legislation. *Allied Stores of Ohio v. Bowers*, 358 U.S. 522, 528 (1959). Intervenors have

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[9] Statutes establishing immunities from tort actions have withstood Equal Protection challenges so long as they are rationally related to a legitimate state interest. *Edelstein v. Wilentz*, 812 F.2d 128, 131-33 (3d Cir. 1987); *Logan v. Hollier*, 699 F.2d 758 (5th Cir. 1983).

not met their burden of demonstrating the lack of any conceivable rational relationship between the alleged classification and the legitimate state purposes underlying the legislation.[10]

The Washington Supreme Court noted a number of reasonable bases for a distinction between bond counsel (and underwriters) and others involved in the issuance of municipal securities. *Haberman v. Washington Public Power Supply System*, 109 Wash.2d 107, 744 P.2d 1032 (1987), *modified and further reconsideration denied*, __ Wash. 2d __, 750 P.2d 254 (1988). These "rational bases" included primarily the expertise of bond counsel and underwriters, the role they play in the process of issuing municipal securities, the reliance placed on bond counsel's opinions, and their form of compensation. *Id.*

In addition to the factors addressed at length by the Washington Supreme Court in *Haberman*, there are other related conceivable rational bases as well. For example, bond counsel and underwriters typically perform their own analysis of municipal bonds and their issuer. Investors often rely on this

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[10] A rational basis for a legislative enactment need not have provided the actual motivation for the legislature's decision. *United States R.R. Retirement Board v. Fritz*, 449 U.S. 166, 179 (1980), *rehearing denied*, 450 U.S. 960 (1981).

> States are not required to convince the courts of the correctness of their legislative judgments . . . .
>
> . . . [P]arties challenging legislation under the Equal Protection Clause . . .cannot prevail so long as "it is evident from all the considerations presented to [the legislature], and those of which we may take judicial notice, that the question is at least debatable."

Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464, *rehearing denied*, 450 U.S. 1027 (1981), *quoting United States v. Carolene Prods. Co.*, 304 U.S. 144, 154 (1938). This Court recognized in *Schweiker v. Wilson*, 450 U.S. 221, 234 (1981), *quoting Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314 (1976), that:

> This [Equal Protection] inquiry employs a relatively relaxed standard reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one. Perfection in making the necessary classifications is neither possible nor necessary.

analysis for confirmation of the accuracy of the information about the issue. Requiring bond counsel and underwriters to answer to a negligence standard is an appropriate and rational distinction supporting the state's undisputed legitimate interest in providing accurate and reliable information to potential investors in municipal securities.

The scienter standard's distinction serves to encourage well-qualified individuals to serve as public officials without fear of unlimited personal liability, while balancing the protection provided purchasers of affected securities. It promotes public bodies' and officials' devotion of their time to developing and implementing necessary public projects, rather than defending litigation brought against them and public issuers.

These rational bases for the Scienter Amendment plainly pass constitutional muster. Even if bond counsel and underwriters are considered a class distinct from all other entities and individuals involved in the issuance of municipal bonds, holding them to a negligence standard is rationally related to a legitimate state interest and, therefore, does not violate the Equal Protection Clause.

C. The Scienter Amendment Is Legitimately Limited To Washington State Securities And Does Not Violate The Equal Protection Clause In That Respect.

Intervenors contend that the Scienter Amendment's distinction between bonds issued by the State of Washington and its political subdivisions, and those bonds issued by other states, is an improper distinction violating the Equal Protection Clause.[11] Intervenors seek to characterize the Scienter Amendment as providing preferential treatment for residents to the detriment of non-residents. Although the Equal Protection Clause can be implicated where a state discriminates against out-of-state entities

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[11] The Washington Supreme Court held that Intervenors lacked standing to assert this claim and rejected their Equal Protection challenge to the Amendment without addressing the merits. *Haberman*, 109 Wash.2d at 138, 744 P.2d at 1055. This ruling was correct. *See* Section II, *supra*.

in favor of in-state entities, the Scienter Amendment creates no such discrimination. This is not the type of statute struck down in *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, *rehearing denied*, 471 U.S. 1120 (1985), in which in-state insurance companies were taxed at a lower rate than out-of-state insurance companies, with no conceivable purpose other than to promote domestic industry and investment. To the contrary, the statute at issue here is part of a comprehensive statutory framework regulating the activities of Washington municipal corporations and political subdivisions. As part of that system of regulation, it is plainly rational for the legislature to define the standard of liability relating to bonds issued by Washington political subdivisions.

For all of these reasons, Intervenors' Equal Protection arguments are without merit.

IV.

INTERVENORS' COMMERCE CLAUSE CHALLENGE TO THE SCIENTER AMENDMENT IS UNFOUNDED.

Intervenors' Commerce Clause argument is equivalent to their an Equal Protection argument and is just as pointless. Intervenors can show no burden upon interstate commerce, as none exists. Moreover, they are seeking to assert the interests of non-Washington public issuers. Intervenors clearly have no standing to raise the rights of non-Washington public issuers, whether within a Commerce Clause or an Equal Protection argument. But, even if they did have standing, their Commerce Clause challenge would be without merit.

A. The Scienter Amendment Does Not Seek To Regulate Commerce.

The purpose of the Commerce Clause is to protect the free movement of commerce across state lines. *See Massachusetts v. United States*, 435 U.S. 444, 462 (1978). Statutes found invalid under that clause are those which effect economic protectionism

by overtly blocking the flow of interstate commerce at a state's borders. *See Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978). As this Court recently noted in *New Energy Company of Indiana v. Limbach*, 56 U.S.L.W. 4475, 4477 (May 31, 1988):

> The Commerce Clause does not prohibit all state action designed to give its residents an advantage in the marketplace, but only action of that description *in connection with the State's regulation of interstate commerce.*

(Emphasis in original.)

The Scienter Amendment *in no manner seeks to regulate interstate commerce*; it affects only the standard of liability of an element of a cause of action created by the Washington legislature. Accordingly, the Commerce Clause simply does not apply.

B. The Scienter Amendment Has No Practical Effect Upon Interstate Commerce.

The burden of showing discrimination under the Commerce Clause rests on the party challenging the validity of the statute. *Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979). To succeed on a Commerce Clause claim, the party challenging the statute must demonstrate real and substantial injury. *See, e.g., Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263 (1984).

In assessing Commerce Clause challenges, courts look to the practical effect of the challenged conduct. *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 37 (1980). Thus, in *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 126, *rehearing denied*, 439 U.S. 884 (1978)(emphasis added), the Court found that the challenged legislation did not violate the Commerce Clause, stating:

> In fact, the Act [regulation of producer/refiner's right to operate retail service station within state] *creates no barriers whatsoever* against interstate independent dealers; it does not prohibit the flow of interstate goods, place added costs upon them, or distinguish

> between in-state and out-of-state companies in the retail market. The absence of any of these factors fully distinguishes this case from those in which a state has been found to have discriminated against interstate commerce.

Generally, courts will only invalidate statutes under the Commerce Clause if they attempt to give, or in fact give, in-state commerce an unreasonable competitive advantage. *See, e.g., Bacchus Imports*, 468 U.S. at 270. Here, Intervenors' *only allegation* of burden is their surmise that non-Washington public issuers may not wish to sell bonds in Washington. But that is not enough. In *C.T.S. Corporation v. Dynamics Corporation of America*, __ U.S. __, 107 S. Ct. 1637 (1987), this Court recently considered a Commerce Clause challenge to an Indiana statute regulating acquisition of control shares in Indiana corporations. The challenge rested on a claim that tender offers for Indiana corporations would be hindered by the statute. The Court noted that there was little evidence that the Indiana Act would limit the number of successful tender offers, and stressed that the Act did not prohibit any entity – resident or non-resident – from offering to purchase or from purchasing shares in Indiana corporations. 107 S.Ct. at 1652.

Exactly the same point applies to the Scienter Amendment. No evidence is cited, and none exists, to support Intervenors' hypothetical proposition that an out-of-state public issuer would be hindered in selling its bonds in Washington.

C. The Scienter Amendment Serves A Legitimate Local Public Interest.

This Court, in *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27, 36 (1980), *quoting Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970), stated:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce

> is clearly excessive in relation to the putative local benefits. . . .

In the instant case, Washington clearly has a legitimate interest in enacting the Scienter Amendment, *see* Section III, *supra*. While nothing in the Scienter Amendment would prevent a non-Washington public issuer from offering its bonds in Washington, any burden on interstate commerce would be incidental to the state's legitimate interest in defining remedial aspects of statutory causes of action.

For all of these reasons, Intervenors' Commerce Clause challenge to the Scienter Amendment is without merit.

V.

THE RETROACTIVITY OF THE SCIENTER AMENDMENT DOES NOT VIOLATE THE DUE PROCESS RIGHTS OF INTERVENORS.

Intervenors claim that they had a property interest in a negligence cause of action involving Supply System bonds, and were unconstitutionally deprived of that cause of action by retroactive operation of the Scienter Amendment. Specifically, they assert that a cause of action is a species of property protected by procedural Due Process requirements, relying on *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982).

Intervenors' argument is misplaced. A constitutionally protected property interest exists only to the extent recognized as such by state law. "Property interests are not created by the Constitution, 'they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. . . .' " *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 538 (1985), *quoting Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Washington law has long held that there is no vested right to a statutorily created tort claim until a final, unreviewable judgment has been obtained. *Seattle Rendering Works, Inc. v. Darling-Delaware Co.*, 104 Wash.2d 15, 19, 701 P.2d 502, 505 (1985); *Johnson v. Continental West, Inc.*, 99 Wash.2d 555, 563, 663 P.2d 482, 486

(1983). No judgment had been entered in favor of Intervenors at the time the legislature enacted the Scienter Amendment, or at the time its retroactivity was clarified. Accordingly, Intervenors had no constitutionally protected property interest in the negligence standard. That inescapable conclusion effectively ends the Due Process inquiry.

A. Intervenors Received Procedural Due Process.

Even assuming, *arguendo*, that a non-vested cause of action were considered a species of property entitled to some Due Process protection, that protection is focused solely on ensuring access to fair procedures for its prosecution. *In re Consolidated United States Atmospheric Testing Litigation*, 820 F.2d 982, 989-90 (9th Cir. 1987), *cert. denied*, __ U.S. __, 108 S.Ct. 1076 (1988). Intervenors' right of access to fair procedures was not affected by the retroactive application of the Scienter Amendment. Thus, procedural Due Process has not been violated.

Intervenors single out the 1986 amendment to the 1985 Scienter Amendment, which merely clarified that the 1985 statute applied retroactively (the "Retroactivity Amendment"). Intervenors concede that "legislative process" is usually all the process that would be due with respect to a statute's enactment. (Intervenors' Jurisdictional Statement, p. 27). But they nevertheless assert that the Washington legislative process here was inadequate because they did not receive sufficient personal notice.

This argument is without merit. Both the Scienter Amendment and the Retroactivity Amendment affected all persons seeking to assert claims with respect to Washington municipal bond issues. The statutes proceeded through the legislative process – subject to public scrutiny – in the normal course. Intervenors had the same opportunity as any other interested person to inquire as to the legislature's agenda and to be heard in opposition. Where legislative enactments affect a general class of persons, those persons affected by the enactments receive procedural Due Process through the legislative process itself, and individuals within the general class have no right to individual

attention. *United States v. LULAC*, 793 F.2d 636, 648 (5th Cir. 1986).

Intervenors suggest that the Washington legislature had a pecuniary interest in the Retroactivity Amendment, and therefore any action the legislature took was in violation of procedural Due Process. They cite *Gibson v. Berryhill*, 411 U.S. 564, 576-78 (1973), and assert that the legislature was protecting in-state ratepayers and punishing out-of-state bondholders. This argument is unavailing.

In *Gibson*, this Court held that a statutory body with the authority to issue, suspend and revoke licenses for the practice of optometry in Alabama could not conduct hearings on a licensing revocation request brought by the Alabama Optometric Association. The statutory body was comprised *solely* of members of the Association. This Court concluded that the bias and pecuniary interests of the members disqualified the statutory body from considering the Association's charges.

Unlike the quasi-judicial licensing proceedings in *Gibson*, the proceedings in enacting the Amendments here were entirely public proceedings of the Washington legislature. If a legislature's actions could be invalidated simply on the ground that the pecuniary interests of some state residents were affected, then virtually no legislation could withstand procedural Due Process scrutiny. This clearly is not the intent and scope of *Gibson*, nor does it make any logical sense.

B. Intervenors' Substantive Due Process Rights Were Not Violated By The Enactment Of The Retroactivity Amendment.

As demonstrated above, Intervenors had no vested right subject to Due Process requirements at all. However, even if they had a protectable property interest in their statutory negligence claim, all that substantive Due Process requires is that there be a rational basis for the retroactive operation of the Scienter Amendment.

As in an Equal Protection analysis, under a substantive Due Process analysis, a statute is presumed to be constitutional, and the burden is on the challenging party to show that it violates Due Process. *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976). Intervenors have the burden of showing that the Retroactivity Amendment was wholly arbitrary and irrational in purpose and effect and is not reasonably related to any legitimate legislative purpose. *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 82-94 (1978); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. at 15-20. Intervenors have not and cannot meet this burden. To the contrary, as explained above, pp. 19-20, there are a number of rational bases underlying the enactment of the Scienter and Retroactivity Amendments.

Intervenors vainly attempt to invoke Commerce Clause principles, *Middle South Energy, Inc. v. Arkansas Public Serv. Comm'n*, 771 F.2d 404 (8th Cir. 1985), *cert. denied*, 474 U.S. 1102 (1986), and the separation of powers doctrine, *United States v. Klein*, 80 U.S. (13 Wall.) 128, 146 (1872), to bolster their groundless Due Process claim. (Intervenors' Jurisdictional Statement at 28.) This Court should reject this attempted "bootstrapping". The lack of merit of the Commerce Clause claim is addressed in Section IV, *supra*. So far as *Klein* is concerned, Intervenors had no vested property interest in their cause of action, thus vitiating their Due Process claim. Furthermore, *Klein* is wholly inapplicable to the Retroactivity Amendment.

First, *Klein* is a separation of powers case, not a Due Process case. Moreover, *Klein* only restricts a legislature from directing a court on how to resolve an issue of fact so as to determine the outcome of litigation. *See In re Consolidated United States Atmospheric Testing Litigation*, 820 F.2d at 992; *United States v. Brainer*, 691 F.2d 691, 695 (4th Cir. 1982). This Court has held that a legislature is not prohibited from enacting legislation that affects pending litigation, so long as the legislation does not attempt to control or dictate the court's ultimate decision in the litigation. *United States v. Sioux Nation of Indians*, 448 U.S. 371, 402-05 (1980). Neither the Scienter nor Retroactivity

Amendment attempts to dictate the ultimate outcome of litigation. They simply establish the standard for liability applicable to certain defendants. In short, the challenged statutes reflect a proper and rational legislative function, and *Klein* has no application.

CONCLUSION

For the reasons stated above, this Court should dismiss this appeal or, in the alternative, affirm the decision of the Washington Supreme Court.

Respectfully submitted,

Daniel R. Murdock
Donovan Leisure Newton & Irvine
30 Rockefeller Plaza
New York, NY 10112
(212) 632-3000

Robert D. Stewart
Culp, Guterson & Grader
One Union Square
Seattle, WA 98101-3143
(206) 624-7141

Attorneys for Appellee
Washington Public Power Supply System

Albert R. Malanca
Gordon, Thomas, Honeywell, Malanca, Peterson & Daheim
2200 First Interstate Plaza
Tacoma, WA 98401
(206) 572-5050

Attorneys for Appellees
City of Ellensburg, WA; City of Tacoma, WA; Public Utility District No. 1 of Benton County, WA; Public Utility District No. 1 of Clark County, WA; Public Utility District No. 1 of Cowlitz County, WA; Public Utility District No. 1 of Grays Harbor, WA; Public Utility District No. 1 of Lewis County, WA; Public Utility District No. 1 of Mason County, WA; Public Utility District No. 3 of Mason County, WA; Public Utility District No. 1 of Okanogan County, WA; Public Utility District No. 2 of Pacific County, WA; Public Utility District No. 1 of Skamania County, WA; Public Utility District No. 1 of Wahkiakum County, WA

Dennis K. Bromley
Pillsbury, Madison & Sutro
225 Bush Street
San Francisco, CA 94104
(415) 983-1000

Attorneys for Appellees
Public Utility District
No. 1 of Chelan County, WA;
Public Utility District
No. 1 of Clallam County, WA;
Public Utility District No. 1
of Douglas County, WA;
Public Utility District No. 1
of Franklin County, WA;
Public Utility District No. 2
of Grant County, WA;
Public Utility District No. 1
of Snohomish County, WA;
City of Richland, WA

Ralph K. Nickerson
Attorney at Law
110 West Allyn
Goldendale, WA 98620
(509) 773-5723

Attorney for Appellee
Public Utility District
No. 1 of Klickitat County, WA

James J. Hagan
Simpson, Thacher & Bartlett
One Battery Park Plaza
New York, NY 10004
(212) 483-9000

Jerry B. Edmonds
Williams, Kastner & Gibbs
1400 Washington Building
Seattle, WA 98111
(206) 628-6600

Attorneys for Appellees
Blyth Eastman Paine Webber,
Inc.; Paine, Webber, Inc.;
Paine, Webber, Jackson &
Curtis, Inc.

Roy J. Moceri
Reed, McClure, Moceri,
Thonn & Moriarty
3600 Columbia Center
701 5th Avenue
Seattle, WA 98104-7007
(206) 292-4900

Attorneys for Appellee
R. W. Beck and Associates

Otto G. Klein, III
Heller, Ehrman, White
& McAuliffe
Suite 2400
4th & Blanchard Building
Seattle, Washington 98121
(206) 464-1490

Attorneys for Appellee
Ebasco Services
Incorporated

STATEMENT PURSUANT TO RULE 28.1

The parent of appellee PaineWebber Incorporated is Paine Webber Group, Inc. Appellees Blyth Eastman Paine Webber Incorporated and Paine Webber Jackson & Curtis, Inc. have been subsumed in the corporate entity, PaineWebber Incorporated, and no longer exist and operate as separate corporate entities. There are no PaineWebber Incorporated subsidiaries or affiliates except wholly-owned subsidiaries.

The parent of appellee Ebasco Services Incorporated is Enserch Corp. Ebasco Services Incorporated has the following subsidiaries: E&L Associates Inc.; E&L Technologies Inc.; Ebasco Constructors Inc.; Ebasco Corporation; Ebasco Energy Resources, Inc.; Ebasco Engineering and Construction Corporation; Ebasco Industries Inc. (Delaware); Ebasco International Corporation; Ebasco Overseas Corporation; Ebasco Plant Services Inc.; Ebasco Risk Management Consultants, Inc.; Ebasco Services International Inc.; and Gates Engineering Consultants.

Appellee R.W. Beck and Associates is a partnership with no corporate parents, affiliates or subsidiaries, except wholly-owned subsidiaries.

The remaining appellees joining in this motion are either municipalities or municipal corporations. They have no corporate parents, affiliates or subsidiaries.

Supreme Court, U.S.
FILED
JUL 18 1988
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CLERK

(3)

No. 87-1889

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC., *et. al.*,

Appellants,

vs.

THE WASHINGTON PUBLIC POWER SUPPLY SYSTEM, *et. al.*,

Appellees

ON APPEAL FROM THE SUPREME COURT OF WASHINGTON

MOTION TO DISMISS

CAMDEN M. HALL*
STELLMAN KEEHNEL
DANIEL L. THIEME
Foster Pepper & Shefelman
1111 Third Avenue
Suite 3400
Seattle, Washington 98101
(206) 447-4400

Attorneys for Appellee
The City of Seattle

*Counsel of Record

July 18, 1988

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

AMERICAN EXPRESS TRAVEL RELATED SERVICES COMPANY, INC., *et al.*,

VS. *Appellants,*

THE WASHINGTON PUBLIC POWER SUPPLY SYSTEM, *et al.*,

Appellees

ON APPEAL FROM THE SUPREME COURT OF WASHINGTON

MOTION TO DISMISS

Appellee The City of Seattle ("Seattle") moves under Sup. Ct. R. 16.1(a) that this appeal be dismissed, on the ground that it is not within this Court's jurisdiction. The decision of the Supreme Court of Washington from which this appeal is taken is not a final judgment or decree and is therefore not appealable.[1]

STATEMENT OF FACTS

The ultimate issue on appeal here is the standard of proof that should apply at trial to Appellants' claims under

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[1] There are two appeals pending in this Court from the same Washington Supreme Court decision: *American Express Travel Related Services Company, Inc.* v. *The Washington Public Power Supply System*, No. 87-1889, and *Haberman* v. *Washington Public Power Supply System*, No. 87-1897. Because the issues related to appealability are identical in both appeals, Seattle has filed identical Motions to Dismiss in both appeals.

the Washington State Securities Act (the "WSSA").[2] The Washington Supreme Court has remanded those claims for trial under a scienter standard of proof, as required by Wash. Rev. Code § 21.20.430(7)(1987) (the "Scienter Amendment"). *Haberman* v. *Washington Public Power Supply System*, 109 Wn.2d 107, 124-47, 178, 744 P.2d 1032, 1048-60, 1075-76 (1987). Appellants ask this Court to hold the Scienter Amendment unconstitutional, so that they can proceed to trial under a negligence standard of proof instead.

This issue may be rendered moot by further proceedings in the Washington courts. For example, Appellants may succeed at trial on their WSSA claims by proving that Appellees acted with scienter. Conversely, Appellees may prevail below on the independent state ground that Appellees were not "sellers" of the bonds within the meaning of the WSSA.[3] Or these claims may be settled before trial.[4] Because of these possibilities, the decision below is not final and may not be appealed.

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2. Wash. Rev. Code Ch. 21.20 (1987).

3. In the opinion below, the Washington Supreme Court held that the federal definition of seller under § 12 of the Securities Act of 1933 should be applied in construing the scope of seller liability under the WSSA. *Haberman*, 109 Wn.2d at 130-33, 744 P.2d at 1051-52. One of the factual issues remanded to the trial court was whether Appellees qualify as sellers under that standard. *Id.* Last month, this Court narrowly limited the scope of persons who may be considered statutory sellers of securities potentially liable under § 12. *Pinter* v. *Dahl*, 56 U.S.L.W. 4579, 4584-88 (June 15, 1988).

4. Appellants are members of the plaintiff class in parallel federal class action securities litigation. *In re Washington Public Power Supply System Securities Litigation*, MDL No. 551 (W.D. Wash.). Settlements of the class claims, including the class WSSA claims, have already been reached with many of the Appellees here, subject to court approval.

DISCUSSION

This appeal is brought under 28 U.S.C. § 1257 (1988), which allows for appeals to this Court of certain "[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had . . . ."

Appellants acknowledge that the Washington Supreme Court's decision is not "final" in the traditional sense. The decision remanding Appellants' WSSA claims for trial "clearly is not one that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.' " *Stringfellow* v. *Concerned Neighbors in Action*, 480 U.S. ____, 107 S. Ct. 1177, 1181 (1987) (quoting *Catlin* v. *United States*, 324 U.S. 229, 233 (1945)). Appellants therefore argue that the decision "falls within one of the narrow categories of decisions that [this Court has] deemed final for purposes of review, even through the entire dispute has not yet been resolved." *Id.*

This Court has recognized four narrow exceptions to the requirement of strict finality in appeals from the state courts. *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975). Appellants attempt to rely on two of the exceptions from the *Cox* case, but neither applies here.

I. THE SECOND *COX* EXCEPTION DOES NOT APPLY HERE

Appellants first assert that this case falls within the second exception to strict finality that was recognized in *Cox*— cases "in which the federal issue, finally decided by the highest court in the State, will survive and require decision regardless of the outcome of further state court proceedings." *Cox*, 420 U.S. at 480. Appellants are wrong. Their constitutional challenge to the Scienter Amendment will be mooted if they prevail at trial below, if Appellees prevail below on an independent state ground, or if these

claims are settled before trial. Thus, this is *not* a case where "the federal issue would not be mooted or otherwise affected by the proceedings yet to be had because those proceedings have little substance, their outcome is certain, or they are wholly unrelated to the federal question." *Id.* at 478.

Because Appellants' constitutional claims may be mooted by the results of trial, the single "category 2" case that Appellants have cited is not germane. *American Export Lines, Inc.* v. *Alvez*, 446 U.S. 274 (1980),[5] involved a writ of certiorari from a New York Court of Appeals ruling allowing Mrs. Alvez to assert a maritime loss of society claim. The New York court remanded for trial. The issue before this Court was whether federal maritime law allowed Mrs. Alvez to recover loss of society damages.

The question of the finality of the state court decision was not raised until oral argument. By that time, Mrs. Alvez had prevailed at trial on remand, and defendant's counsel conceded that the defendant's appeal from the trial verdict would not challenge the award of loss of society damages. Under these narrow circumstances—where the claim had been fully tried before the issue of finality was raised here, and could not be affected by further proceedings below—this Court held that the New York Court of Appeals decision fell within the second "categorical exception to strict finality." *Id.* at 277-79.

The facts are very different here. Unlike in *American Export Lines*, it is not known here whether Appellants' constitutional claims will be mooted by further proceedings below.

The constitutional issues raised here "are too important to be decided save when absolutely necessary, and are to be

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5. This case was cited only by the Amexco/US Appellants in No. 87-1889.

avoided if there are grounds for decision of lesser dimension." *Cox*, 420 U.S. at 509 (Rehnquist, J., dissenting). The state court process may yet render review of Appellants' constitutional claims unnecessary. As a result, the second *Cox* exception does not apply to this case.[6]

II. THE FOURTH *COX* EXCEPTION DOES NOT APPLY HERE

Appellants also attempt to rely on the fourth exception recognized in *Cox*. Again, Appellants' reliance is misplaced.

Under the fourth *Cox* exception, immediate review is allowed where *both* (1) "reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action," and (2) "a refusal immediately to review the state court decision might seriously erode federal policy." *Cox*, 420 U.S. at 482-83. This appeal meets neither requirement.

A. Reversal Will Not Terminate The Litigation of Appellants' WSSA Claims

Reversal of the state court decision would not preclude further litigation of Appellants' WSSA claims. Reversal would "merely control[] the nature and character of . . . the state proceedings still to come," *Cox*, 420 U.S. at 483,

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[6] The Haberman Appellants, in No. 87-1897, also cite *Mills* v. *Alabama*, 384 U.S. 214 (1966). *Mills* is an example of the first *Cox* exception—cases "where for one reason or another the federal issue is conclusive or the outcome of further proceedings preordained." *Cox*, 420 U.S. at 479. *Mills* involved a first amendment challenge to a criminal prosecution. The Alabama Supreme Court had upheld the criminal statute involved, and remanded for trial. The defendant conceded that he had no defense if the statute was constitutionally sound. Thus the outcome on remand was preordained, and appeal was appropriate. *Mills*, 384 U.S. at 217-18. *Mills* has no application here, where the outcome on remand will not be known until after trial.

by changing the standard of proof at trial from scienter to negligence.[7]

Because reversal would not determine the outcome of Appellants' WSSA claims, this case is not like the three "category 4" cases that Appellants cite.[8] For instance, in *Southland Corporation* v. *Keating*, 465 U.S. 1, 6-7 (1984), this Court allowed the appeal in part because "reversal of a state-court judgment in this setting will terminate litigation of the merits of this dispute."

Hudson Distributors, Inc. v. *Eli Lilly & Co.*, 377 U.S. 386 (1964), also involved a dispositive issue on appeal. That case was a suit by a retailer to invalidate a state fair trade act on federal antitrust grounds. The Ohio Supreme Court upheld the statute, and remanded for enforcement proceedings. This Court accepted review, noting that the issues still pending in the Ohio courts were separate from the validity of the statute. *Id.* at 389 n.4. If this Court had reversed the Ohio Supreme Court, and invalidated the statute, the remanded state court proceedings to enforce the statute would have been terminated.

Mercantile National Bank v. *Langdeau*, 371 U.S. 555 (1963), involved the assertion by two defendant national banks that a special federal venue statute immunized them from suit in Travis County, Texas. The Texas Supreme Court refused to enforce the federal venue statute, and remanded for trial. This Court accepted review, stating that the venue issue was "a separate and independent matter, anterior to the merits and not enmeshed in the factual and

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7. The Haberman Appellants, in No. 87-1897, assert that reversal of the Washington Supreme Court "will likely result in summary disposition of this case and many of these related cases." This assertion is speculative and totally unsupported.

8. These three cases, discussed *infra*, were cited only by the Haberman Appellants in No. 87-1897.

legal issues comprising the plaintiff's cause of action." *Id.* at 558. This Court then upheld the venue statute and reversed the Texas decision, thereby terminating the suit against the national banks in Travis County.

The case at bar does not fit the mold of these cases. The standard of proof issue that Appellants seek to bring before this Court is not dispositive of their WSSA claims. It is not an issue that is "separate and independent" from the merits of the underlying cause of action. The question of the standard of proof to be applied at trial is the very sort of interlocutory issue, "enmeshed in the factual issues comprising the plaintiff's cause of action," *id.* at 558, that should await trial before being reviewed here. This appeal does not satisfy the requirement that reversal would preclude further litigation. This appeal should be dismissed.

B. Refusing Immediate Review Will Not Erode Federal Policy

The second element of the fourth *Cox* exception likewise is not satisfied here, since no serious erosion of federal policy will result if the Washington Supreme Court decision is allowed to stand pending trial. *Cox*, 420 U.S. at 483.

The standard of proof to be applied to Appellants' state law securities fraud claims does not affect the future conduct of third parties. This is not a case where first amendment rights will be chilled if the state decision is left unreviewed. *Cf. Cox*, 420 U.S. at 485-86.

Nor is this a case where a federal statutory scheme will be undetermined if an incorrect state supreme court decision is left standing. *Cf. Southland*, 465 U.S. at 6-7 (Federal Arbitration Act); *Hudson Distributors*, 377 U.S. at 395 (Sherman Act); *Mercantile National Bank*, 371 U.S. at 558-62 (National Banking Act). The Washington Supreme Court decision merely requires Appellants to try their state

law securities claims under a scienter standard of proof—*consistent* with the federal securities scheme. *See Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 193 (1976) (scienter is an essential element of a federal securities fraud claim under § 10(b) of the Securities Exchange Act of 1934).

The resolution of Appellants' constitutional claims "can await final judgment without any adverse effect upon important federal interests. A contrary conclusion would permit the fourth [*Cox*] exception to swallow the rule." *Flynt* v. *Ohio*, 451 U.S. 619, 622 (1981). Since no federal policy will be undermined by allowing this case to go to trial before review is had here, this appeal should be dismissed.

CONCLUSION

Strict finality of the state court decision below is ordinarily required for an appeal to this Court. No recognized exception to that requirement applies here. This appeal should be dismissed for want of jurisdiction.

Respectfully submitted,

CAMDEN M. HALL*
STELLMAN KEEHNEL
DANIEL L. THIEME
Foster Pepper & Shefelman
1111 Third Avenue,
Suite 3400
Seattle, Washington 98101
(206) 447-4400
Attorneys for Appellee
The City of Seattle

*Counsel of Record

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No. 87-1889

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IN THE

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OCTOBER TERM, 1987

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Appellants,

v.

WASHINGTON PUBLIC POWER SUPPLY SYSTEM, *et al.*,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF WASHINGTON

BRIEF IN OPPOSITION TO MOTIONS TO DISMISS OR AFFIRM

STEPHEN A. WEINER
DAVID G. KEYKO*
SUSAN J. KOHLMANN
WINTHROP, STIMSON, PUTNAM & ROBERTS
40 Wall Street
New York, New York 10005
(212) 943-0700
Attorneys for Appellants
American Express Companies
and
WALTER S. TABLER
SMITH, SMART, HANCOCK, TABLER & MIDDLEBROOKS
3800 Columbia Seafirst Center
701 Fifth Avenue
Seattle, Washington 98104
(206) 624-7272
Attorneys for Appellants
American Express Companies and United States Trust Company of New York, as Trustee
* *Counsel of Record*

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STATEMENT PURSUANT TO RULE 28.1

The Statement Pursuant to Rule 28.1 may be found at page 139a of the Appendix to the Jurisdictional Statement.

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No. 87-1889

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OCTOBER TERM, 1987

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Appellants,

v.

WASHINGTON PUBLIC POWER SUPPLY SYSTEM, *et al.*,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF WASHINGTON

BRIEF IN OPPOSITION TO MOTIONS TO DISMISS OR AFFIRM

Amexco/US[1] files this brief in opposition to the three motions to dismiss filed on behalf of WPPSS by the City of Ellensburg, et al. ("Ellensburg Br."), the City of Seattle ("Seattle Br.") and the Columbia Appellees[2] ("Columbia

[1] This and other terms are as defined in the Jurisdictional Statement of Amexco/US.

[2] The Columbia Appellees have not served counsel of record for Amexco/US.

Br.").[3] These motions contain a number of misstatements, the most significant of which are set forth below.

I. The Court Has Appellate Jurisdiction Of This Appeal Under 28 U.S.C. 1257(2)

Supreme Court review of this appeal, which involves the largest municipal bond default in history, is entirely appropriate. WPPSS has attempted at every turn to prevent the bondholders from obtaining a fair hearing on their multibillion dollar claims. WPPSS, working with the Washington legislature, has sought to change the outcome of this and related actions through the passage of the Scienter and Retroactivity Amendments. That legislation removed the negligence cause of action under WSSA and expressly made that change applicable to these lawsuits. Now, WPPSS seeks to preclude review of these obviously unconstitutional Amendments on the basis of empty formalities.

First, this Court has jurisdiction under the fourth criterion of the *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975) analysis – – it would seriously erode federal constitutional policy to force Amexco/US to forego trial of its negligence cause of action based upon an unconstitutional amendment to WSSA. Federal policy will be eroded because Amexco/US' constitutional rights will be impaired, no matter what the outcome of the litigation, if it is required to endure the burden and expense of a protracted trial before this Court reviews the constitutionality of the Scienter and Retroactivity Amendments.

WPPSS' arguments that review is inappropriate now would lead to a preposterous result. For example, if a test had been altered to require a higher passing score from women than men, WPPSS' argument, if accepted, would require that a woman's constitutional challenge not be heard until she had studied, albeit much harder than a man would have to, and

[3] In his letter of June 7, 1988, Albert R. Malanca, on behalf of all appellees, stated that additional time to respond to the jurisdictional statements filed in this and the *Haberman* appeal (No. 87-1897) was needed because the appellees intended to file one joint response. In fact, three separate briefs have been filed and some of the appellees have not filed any opposition to the appeal.

taken the test and failed to achieve the higher passing score. Similarly, WPPSS argues that Amexco/US must endure a much more difficult test than it should have to – – undertaking a lengthy and expensive trial on a scienter cause of action rather than trying a simpler negligence cause of action with a greater likelihood of success – – to see if it fails before the constitutionality of the legislation changing the rules may be challenged.

Second, a decision by the Court here will have far-reaching, immediate implications for other WPPSS cases further demonstrating the need to invoke the Court's jurisdiction to protect federal policy. The *WPPSS Federal Action*, in which Amexco/US are members of the plaintiff class, includes WSSA claims. It is estimated that the trial, which is scheduled to begin on September 7, 1988, will last between 6 months and 2 years. Moreover, while the court in the *WPPSS Federal Action* reversed its prior ruling that the Retroactivity Amendment violated principles of separation of powers,[4] it remained "convinced that the actions of the Washington Legislature in this matter were inappropriate and overreaching." *In re Washington Public Power Supply System Sec. Litig.*, MDL No. 551 (W.D. Wash. July 14, 1988) (order addressing defendants' motions for summary judgment) at 55. A second case, *Hoffer v. Washington*, No. 53549-3, certain aspects of which are now pending before the Washington Supreme Court, involves a WSSA claim against Washington State officials over the sale of WPPSS Bonds. Should this Court not accept Amexco/US' appeal, the constitutional rights of plaintiffs in those WPPSS actions will be lost for all practical purposes because of the impracticality of retrial.

Third, no purpose will be served by awaiting completion of a trial because the highest court of the state has ruled on the issue now before the Court. Nothing that will occur in future

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[4] The Columbia Appellees assert that dismissal is warranted because Amexco/US has not raised a separation of powers argument which was initially accepted by the court in the *WPPSS Federal Action*. (Columbia Br. at 14-15). Amexco/US has not raised the issue because separation of powers is a matter of state constitutional law, not federal constitutional law, and thus not reviewable by this Court.

proceedings will explain or alter the Washington Supreme Court's decision. Therefore, in accordance with this Court's "pragmatic approach" to the question of finality, Amexco/US' appeal of the Washington Supreme Court's decision should be accepted for review.

II. The Passage Of The Scienter Amendments Was Not An Attempt To Maintain The Status Quo

The Ellensburg appellees have asserted that prior to 1980, it was understood that the standard of proof under WSSA was fraud and that *Kittilson v. Ford*, 93 Wash. 2d 223, 608 P.2d 264 (1980), changed that standard to negligence. (Ellensburg Br. at 6). Based upon this claim, the Ellensburg appellees assert that scienter amendments were enacted over a concern about this "change". (*Id.* at 7).

The appellees are wrong; the standard of proof under WSSA was negligence until the Scienter Amendment was adopted. As the Washington Supreme Court stated below, Wash. Rev. Code § 21.20.430(7) of WSSA "parallels section 410 of the Uniform Securities Act, which in turn is modeled after section 12(2) of the federal Securities Act of 1933" – – a negligence statute. *Haberman v. Washington Public Power Supply System*, 109 Wash. 2d 107, 125, 744 P.2d 1032, 1048 (1987). In fact, WSSA is to be interpreted more liberally than the Securities Act of 1933. The Washington Supreme Court observed that "while the purpose of federal securities laws is to maintain the integrity of the secondary securities markets and to enforce disclosure, the WSSA is intended to protect investors." *Id.* at 125, 744 P.2d at 1049.

Prior to the decision of the Washington Supreme Court in *Kittilson v. Ford*, WSSA was construed to afford a negligence cause of action. *Shermer v. Baker*, 2 Wash. App. 845, 857-58, 472 P.2d 589, 597 (1970). This is conceded by the Columbia Appellees. (Columbia Br. at 4-5). In *Kittilson*, the Washington Supreme Court again considered the issue and agreed with the *Shermer* court. 93 Wash. 2d at 227, 608 P.2d at 266. In the interim, the anomalous case of *Ludwig v. Mutual Real Estate*

Investors, 18 Wash. App. 33, 567 P.2d 658 (1977), was decided. *Ludwig* construed an already obsolete version of Wash. Rev. Code § 21.20.430, finding that the words "fraud or misrepresentation" were to be given their common law meanings, requiring scienter. 18 Wash. App. at 40-41, 567 P.2d at 661-62. At the time of the *Ludwig* decision, the language it construed had already been excised from the securities law. Act of June 6, 1977, ch. 172 (4), 1977 Wash. Laws, 1st Ex. Sess. 672. Thus, the decision had no prospective effect, and did not establish a viable rule of construction. The result of this series of cases was an uninterrupted application of the negligence standard: following the 1970 *Shermer* ruling, there was no question that the standard was negligence; in 1977, *Ludwig* construed old language *but did not change the rule for future cases;* in 1980, the negligence standard was reaffirmed in *Kittilson.*

The Scienter and Retroactivity Amendments were indeed a reaction to case law – – that of this and related actions and not the *Kittilson* decision.

III. The Scienter And Retroactivity Amendments Violate The Commerce Clause Of The Constitution

First, as an apparent concession that Amexco/US has raised a valid challenge under the Commerce Clause, no mention has been made of Amexco/US' principal argument in support of a Commerce Clause violation – – that the Amendments unconstitutionally shifted liability from the local utilities and their rate payers to the bond purchasers, who like Amexco/US were predominantly from outside the state, and to the New York-based Bond Counsel and underwriters. *See* Jurisdictional Statement at 14-18. Not surprisingly, WPPSS has also made no mention of the two cases which clearly support Amexco/US' claim that this attempt to shift liability violates the Commerce Clause: *New England Power Co. v. New Hampshire,* 455 U.S. 331 (1982) and *Middle South Energy, Inc. v. Arkansas Public Serv. Comm'n,* 772 F.2d 404 (8th Cir. 1985),

cert. denied, 474 U.S. 1102 (1986), discussed at pages 15-17 of the Jurisdictional Statement. These cases are indistinguishable from the facts here.

Second, the Ellensburg appellees argue that the Scienter and Retroactivity Amendments do not regulate or affect interstate commerce citing *Exxon Corp. v. Governor of Maryland,* 437 U.S. 117, 126 (1978). (Ellensburg Br. at 22-23). In that case, the Court was faced with a divestiture rule requiring petroleum refiners to sell their Maryland gasoline dealerships. No impediment to interstate commerce was found because the required divestiture of service stations did not threaten the flow of gasoline into Maryland, place any additional cost upon the sale of gasoline to Maryland dealers or distinguish in any way between in-state and out-of-state companies. In contrast, here the State of Washington has tried to shift the cost of paying for the $2.2 billion default from Washington residents to those located outside the state. Unlike the *Exxon* case, the shifting of liability for this enormous loss from the interstate sale of bonds clearly affects interstate commerce by purposefully creating a distinction between the liability of those in-state and those located outside of the state.

IV. The Scienter And Retroactivity Amendments Violate The Equal Protection Clause Of The Constitution

First, the Ellensburg appellees improperly argue that the Amendments do not single out Bond Counsel and underwriters, as their coverage by the Amendments has merely been defined away by a clarification of the terms "employee" and "agent". (Ellensburg Br. at 16-17). If followed to its logical conclusion, this argument would mean that, for example, minorities could be excluded from certain benefits by not including them in the definition of "persons". The absurdity of this claim is highlighted by the fact that the Washington attorneys, Houghton Cluck, fall within the definition of "employee" and "agent", whereas New York Bond Counsel, Wood Dawson, which rendered the identical opinion, do not.

Second, WPPSS has ignored the legislative history of the Scienter and Retroactivity Amendments which makes clear that the state's purpose for the discrimination against Bond Counsel and underwriters is not legitimate. Thus, there is no reason to reach the rational relationship step of the applicable test. (Jurisdictional Statement at 20-23). Like the "hippies" in *United States Dep't of Agric. v. Moreno,* 413 U.S. 528 (1973), the Bond Counsel and underwriters have been singled out because they are politically disfavored, being out-of-staters.

Third, the Ellensburg appellees argue that there is no discrimination against non-Washington bond issuers, because the Scienter and Retroactivity Amendments were part of a comprehensive statutory framework to regulate Washington entities. (Ellensburg Br. at 20-21). This claim is belied by the fact that the legislation makes no attempt to regulate Washington issuers, like the Supply System, because they are held liable only if they committed fraud. In contrast, non-Washington issuers are being regulated because they must act in a non-negligent fashion to avoid liability.

V. Amexco/US Has Standing To Raise Equal Protection Clause And Commerce Clause Violations

First, it is undisputed that Amexco/US has standing to assert that the Retroactivity Amendment violates the Due Process Clause of the Constitution. Amexco/US, therefore, has standing to raise Equal Protection Clause and Commerce Clause violations as well. This Court has clearly held that if a party has standing for some purposes, it has standing to raise "any relevant question of law." *Federal Communications Comm'n v. Sanders Bros. Radio Station,* 309 U.S. 470, 477 (1940). *See also Iowa Independent Bankers v. Board of Governors of the Federal Reserve System,* 511 F.2d 1288 (D.C. Cir.), *cert. denied,* 423 U.S. 875 (1975).

Second, appellees contend that Amexco/US has no standing because it does not assert its own rights. In *Director, Office of Workers' Compensation Programs v. Perini North River*

Assoc., 459 U.S. 297, 303-05 (1983), the director's right to raise the right of an injured employee was not questioned where the employee filed a brief in support of the director's appeal. Here, it is undisputed that Wood Dawson has standing to challenge the constitutionality of the Scienter Amendment based on the Equal Protection Clause. Because Wood Dawson raised the issue in the court below and has not only filed a brief in support of Amexco/US' appeal but also cross-appealed,[5] Amexco/US may raise the issue.

VI. The Retroactivity Amendment Violates The Due Process Clause Of The Constitution

First, the Ellensburg appellees argue that Amexco/US has no vested right in its WSSA negligence cause of action because Washington law does not recognize such a vested right. (Ellensburg Br. at 24-25). This is incorrect. Washington law is relevant to the scope and dimensions of the WSSA negligence cause of action; however, whether this cause of action constitutes a constitutionally protected property right is a question of federal constitutional law.

This principle was made clear in this Court's decision in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). There, the Illinois Supreme Court held that a constitutionally protected property right did not exist in a cause of action under the Illinois Fair Employee Practices Act. Despite the state court's ruling, this Court held that the cause of action did constitute a protected property interest under the Fourteenth Amendment. *Id.* at 428.

Second, the Ellensburg appellees assert that Amexco/US received due process, because the Washington legislature's

[5] Wood Dawson has raised precisely the same arguments as Amexco/US, but contends that a different remedy is appropriate for the violations. However, the proper remedy is not to include Wood Dawson within the terms of the Retroactivity and Scienter Amendments because the Amendments state that: "[u]nder no circumstances whatsoever shall this subsection be applied to require purchasers to establish scienter on the part of bond counsels or underwriters." Wash. Rev. Code § 21.20.430(7). Rather, the entire Amendments must be stricken.

agenda was publicly available. (Ellensburg Br. at 25). This totally ignores the fact that Amexco/US, a nonresident, had no elected representative in that legislative body to speak on its behalf at the legislative sessions. No representative of Amexco/US or any other bondholder was invited to address the Washington legislature. Moreover, the legislature had a pecuniary interest in the matter – – both the legislators and their constituents will have to pay for a judgment in favor of Amexco/US in the form of increased utility rates.[6] For these reasons, legislative process was deficient in this instance.

Third, the Ellensburg appellees argue that the passage of the Retroactivity Amendment did not deprive Amexco/US of substantive due process because the legislation was not an attempt to dictate the outcome of this litigation. (Ellensburg Br. at 27-28). This assertion completely ignores the statute's legislative history. Senator Bottinger, the sponsor of the Retroactivity Amendment, stated:

> So the vote here is, in my opinion, shall the underwriting firm that handled that bond issue and their bond counsels pay the bondholders, or shall the rate payers – – the people of the state of Washington. This bill says not the rate payers.

Remarks of Senator Bottinger, *Journal of Senate Debates* 5 (Feb. 16, 1986).

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[6] A portion of the language from *United States Trust Co. v. New Jersey,* 431 U.S. 1 (1977), quoted at page 28 of Amexco/US' Jurisdictional Statement was inadvertently omitted. The full quotation is: "[C]omplete deference to a legislative assessment of reasonableness and necessity is not appropriate [where] the State's self-interest is at stake." *Id.* at 26.

CONCLUSION

The Court should note probable jurisdiction.

Respectfully submitted,

STEPHEN A. WEINER
DAVID G. KEYKO*
SUSAN J. KOHLMANN
WINTHROP, STIMSON, PUTNAM
& ROBERTS
40 Wall Street
New York, New York 10005
(212) 943-0700

Attorneys for Appellants
American Express Companies

and

WALTER S. TABLER
SMITH, SMART, HANCOCK,
TABLER & MIDDLEBROOKS
3800 Columbia Seafirst Center
701 Fifth Avenue
Seattle, Washington 98104
(206) 624-7272

Attorneys for Appellants
American Express Companies
and United States Trust
Company of New York,
as Trustee

* *Counsel of Record*

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